

EXECUTIVE COMMITTEES—CREATION, PROCEDURES, AND AUTHORITY

Executive committees, relatively new board of director aids, are committees composed of directors which can act for the corporation in place of the full board of directors.¹ They have been increasingly used by large, publicly held corporations in the last few decades,² and have prompted considerable comment during that period of time.³ There is, however, a need to correlate, along functional lines, the older case law and the more recent, but nearly universal, statutory regulation of executive committees⁴ both with each other and with the actual practice of corporations which use such committees.

Information concerning executive committee use in publicly held corporations was obtained by means of three recent surveys. One survey, entitled *The Executive Committee of the Board of Directors: Duties, Mem-*

1. Comment, *Corporations—The Executive Committee in Corporate Organization—Scope of Powers*, 42 MICH. L. REV. 133, 135-36 (1943). This Comment contains the most comprehensive review and analysis of the older case law in the executive committee field.

2. See Mylander, *Management by Executive Committee*, 33 HARV. BUS. REV. 51 (May-June 1955).

3. See generally Aurell, *The Corporate Executive Committee: A Dilemma for the Nonmember Director*, 17 U. FLA. L. REV. 525 (1965); Mehler, *Directorial Group Action and Legal Responsibility*, 33 N.D.L. REV. 190 (1957); Note, *Corporate Executive Committees*, 16 CLEV.-MAR. L. REV. 167 (1967); Comment, *Corporations—The Executive Committee in Corporate Organization—Scope of Powers*, 42 MICH. L. REV. 133 (1943); Comment, *Delegating the Managerial Functions of Corporate Directors*, 5 SO. TEX. L.J. 293 (1960); Note, *Delegation of Duties by Corporate Directors*, 25 ALBANY L. REV. 93 (1961); 6 ARK. L. REV. 486 (1951); 34 CHI.-KENT L. REV. 339 (1956); 20 HARV. L. REV. 225 (1906); 35 KY. L.J. 156 (1947); 34 MARQ. L. REV. 48 (1950); 47 VA. L. REV. 278 (1961).

4. All states and the District of Columbia, with the exception of Arizona and Montana, currently have such statutes. ALA. CODE tit. 10, § 21(29) (Supp. 1965); ALASKA STAT. § 10.05.195 (1962); ARK. STAT. ANN. § 64-306 (1966); CAL. CORP. CODE §§ 501(e), 822 (Deering 1962); COLO. REV. STAT. ANN. § 31-5-7 (1963); CONN. GEN. STAT. REV. § 33-318 (1962); DEL. CODE ANN. tit. 8, §§ 141(c), (g) (Supp. 1966); D.C. CODE § 29-916(e) (1961); FLA. STAT. ANN. § 608.09(2) (Supp. 1966); GA. CODE ANN. § 22-1867 (1966); HAWAII REV. LAWS § 172-97 (1955); IDAHO CODE ANN. § 30-139 (Supp. 1965); ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 25-206 (1960), § 25-208 (Supp. 1966); IOWA CODE ANN. § 496A.39 (Supp. 1966); KAN. GEN. STAT. ANN. § 17-3101 (1964); KY. REV. STAT. ANN. § 271.345 (1963); LA. REV. STAT. ANN. §§ 12:29(B)(7), 12:34(C)(7) (1950); ME. REV. STAT. ANN. tit. 13, § 371 (1964); MD. ANN. CODE art. 23, § 59 (1966); MASS. GEN. LAWS ANN. ch. 156B, § 55 (Supp. 1966); MICH. STAT. ANN. § 21.13(4)(d) (1963); MINN. STAT. ANN. §§ 301.28(4)(7), (8) (Supp. 1966); MISS. CODE ANN. § 5309-77 (Supp. 1966); MO. REV. STAT. § 351.330 (1959); NEB. REV. STAT. § 21-114 (1962); NEV. REV. STAT. § 78.125 (1963); N.H. REV. STAT. ANN. § 294:89 (1966);

bership, Compensation,⁵ was conducted by McCulloch and Thompson for the *Conference Board Record* in 1966, and will be referred to as the Conference Board Record survey. Another survey was made in 1962 by the National Industrial Conference Board in cooperation with the American Society of Corporate Secretaries for inclusion in *Corporate Directorship Practices*,⁶ and will be referred to as the National Industrial Conference survey. The third survey was conducted by the author of this note by sending a questionnaire (reproduced in Appendix A) to the secretaries of 470 corporations.⁷ Two hundred replies were received, of which 161 were of sufficient detail to provide information for this note. Because of a pledge of confidentiality, the names of the respondents will not be used. When reference is made to a survey without naming it, the reference will be to the author's survey.

CREATION, PROCEDURES, AND AUTHORITY OF EXECUTIVE COMMITTEES.

The three basic areas which have concerned the courts and the legislatures are: (1) creation and control, (2) procedures and mechanics, and (3) authority and power of the committee. In each of these areas the discussion will concentrate on the statutes, case law, and actual practices as revealed by the surveys.

A. *Creation and Control of the Executive Committee*

1. *Creation*

Since the board of directors is the body which is entrusted by statute

N.J. STAT. ANN. § 14:7-4 (1937); N.M. STAT. ANN. § 51-2-14 (1962); N.Y. BUS. CORP. LAW § 712 (McKinney 1963); N.C. GEN. STAT. § 55-31 (1965); N.D. CENT. CODE ANN. § 10-19-42 (1960); OHIO REV. CODE ANN. §§ 1701.11(B)(5), 1701.63 (Page 1964); OKLA. STAT. ANN. tit. 18, §§ 1.36, 1.38(7) (1953); ORE. REV. STAT. § 57.206 (1965); PA. STAT. ANN. tit. 15, §§ 2852-402(6), (7) (Supp. 1966); R.I. GEN. LAWS § 7-4-6 (1956); S.C. CODE ANN. § 12-18.11 (Supp. 1966); S.D. CODE § 11.0707 (1939); TENN. CODE ANN. § 48-406 (1964); TEX. BUS. CORP. ACT art. 2.36 (1956); UTAH CODE ANN. § 16-10-39 (1962); VT. STAT. ANN. tit. 11, § 223 (1959); VA. CODE ANN. § 13.1-40 (1964); WASH. REV. CODE ANN. § 23A.08.400 (Supp. 1966) (effective July 1, 1967); W. VA. CODE ANN. §§ 31-1-16, -20 (1966); WIS. STAT. ANN. § 180.36 (Supp. 1967); WYO. STAT. ANN. § 17-36.37 (1965); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966).

5. McCulloch & Thompson, *The Executive Committee of the Board of Directors: Duties, Membership, Compensation*, 3 CONFERENCE BOARD RECORD 16 (July 1966).

6. NATIONAL INDUSTRIAL CONFERENCE BD. & AMERICAN SOC'Y OF CORPORATE SECRETARIES, *CORPORATE DIRECTORSHIP PRACTICES* 112 (1962).

7. The survey was conducted on those corporations which are required to file annual reports with the Securities and Exchange Commission, as listed in SECURITIES & EXCHANGE COMM'N, *DIRECTORY OF COMPANIES FILING ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION* (1965). Questionnaires were sent to every tenth company so listed which was also listed in STANDARD & POOR, *POOR'S REGISTER* (1966).

with the managerial authority over corporate affairs,⁸ most executive committee statutes grant the power to create the committee directly to the board.⁹ Some statutes absolutely vest the power of creation in the board of directors—"the board of directors may . . . designate one or more committees . . ."¹⁰—as it sees fit. Others vest the power to create an executive committee in the board except as otherwise provided in the by-laws,¹¹ the certificate of incorporation,¹² or both.¹³ Under the latter type of statute, the existence of the board's power is not contingent upon charter or by-law authorization, but its continuance is dependent on the absence of a negating charter or by-law provision.¹⁴ It is in essence a defeasible power.

In contrast, the Model Business Corporation Act¹⁵ and several state statutes¹⁶ make the existence of the board's power to create an executive committee contingent upon charter or by-law authorization—"If the articles of incorporation or by-laws so provide, . . ."¹⁷ Unless there is an enabling authorization, the directors do not have the power to create a committee.¹⁸ Because such statutes require a charter or by-law provision allowing the board to create a committee before a director resolution making the appointment is valid, the power over creation is, in effect, held indirectly by those who control amendments to the corporate charter or

8. *E.g.*, DEL. CODE ANN. tit. 8, § 141(a) (1953); ABA-ALI MODEL BUS. CORP. ACT § 33 (1966) ("The business and affairs of a corporation shall be managed by a board of directors.").

9. *E.g.*, ALA. CODE tit. 10, § 21(29) (Supp. 1965). *But see* HAWAII REV. LAWS § 172-97 (1955); ME. REV. STAT. ANN. tit. 13, § 371 (1964). *See generally* ABA-ALI MODEL BUS. CORP. ACT ANN. § 38 (1966). The Hawaii and Maine statutes authorize appointment of committees of the board of directors, but do not state expressly who has the power of appointment.

10. DEL. CODE ANN. tit. 8, § 141(c) (Supp. 1966); *accord*, ALA. CODE tit. 10, § 21(29) (Supp. 1965); IND. ANN. STAT. § 25-208 (Supp. 1966); KAN. GEN. STAT. ANN. § 17-3101 (1964); LA. REV. STAT. ANN. § 12:29(B)(7) (1950); MICH. STAT. ANN. § 21.13(4)(d) (1963); NEB. REV. STAT. § 21-114 (1962); N.H. REV. STAT. ANN. § 294:89 (1966); W. VA. CODE ANN. § 31-1-16 (1966).

11. KY. REV. STAT. § 271.345(4) (1963); MINN. STAT. ANN. § 301.28 (4)(8) (Supp. 1966).

12. FLA. STAT. ANN. § 608.09(2) (1956).

13. IDAHO CODE ANN. § 30-139(2)(e) (Supp. 1965).

14. Note that some statutes use the term "unless" rather than "except." *E.g.*, NEV. REV. STAT. § 78.125 (1963).

15. ABA-ALI MODEL BUS. CORP. ACT § 38 (1966) (hereinafter referred to in the text as the Model Act).

16. *E.g.*, MO. REV. STAT. § 351.330 (1966) (by-laws); N.Y. BUS. CORP. LAW § 712 (McKinney 1963).

17. ILL. ANN. STAT. ch. 32, § 157.39 (Smith-Hurd Supp. 1966).

18. *Compare* OKLA. STAT. ANN. tit. 18, § 1.36 (1953), *with* OKLA. STAT. ANN. tit. 18, § 1.38(7) (1953).

by-laws—usually the shareholders.¹⁹ So that, if the board's power to create an executive committee is contingent upon by-law authorization, but by-law authorization is dependent upon shareholder approval, either directly or through charter amendment control, it is the shareholders as a group who in reality have the power to decide whether to create an executive committee.

In summary, although executive committees are always created by a board of directors' resolution, whether or not the board in fact possesses the power to decide whether to create a committee is dependent upon whether the board's power of creation is contingent or vested. If it is vested, the board has the power to decide to use a committee if it wants, or has that power at least until the by-laws are amended to take away that power. If it is contingent upon corporate charter or by-law authority, the power of committee creation rests with the group, directors or shareholders, having charter or by-law adoption and amendment powers.²⁰

The survey indicates that the by-laws of 85 of the 101 corporations with executive committees give the directors the power to create those committees; 12 of these 85 reported that the power was granted by the charter as well as the by-laws.²¹ The Conference Board Record survey found that most reporting companies have specific by-law provisions establishing the committee or allowing the board of directors to do so, but that some boards of directors had done so without by-law authorization. The National Industrial Conference survey indicated that 90% of the manufacturing companies reporting had by-laws which permitted or required the creation of an executive committee; 87% had comparable charter provisions and

19. *E.g.*, DEL. CODE ANN. tit. 8, § 242(d) (Supp. 1966); ABA-ALI MODEL BUS. CORP. ACT § 54 (1966).

20. Furthermore, some statutes also treat the problem of committee creation in the section describing what provisions a corporation's by-laws may contain; the by-laws may contain a director enabling provision regarding executive committees. CAL. CORP. CODE § 501 (Deering 1962); IND. ANN. STAT. § 25-206 (1960); LA. REV. STAT. ANN. § 12:29(B)(7) (1950); OHIO REV. CODE ANN. § 1701.11(B)(5) (Page 1964); W. VA. CODE ANN. § 31-1-20 (1966).

21. A typical charter reads: "[T]he Board of Directors are [sic] expressly authorized: . . . To appoint standing committees by affirmative vote of a majority of the whole Board, and such standing committees shall have and may exercise such powers as shall be confirmed or authorized by the By-Laws." The by-laws of the same company provide: "The Board of Directors shall elect from the Directors an Executive Committee. . . ." Another company's by-laws are more permissive: "The Board, by resolution adopted by a majority of the whole Board, may designate . . . an Executive Committee . . ." However, one respondent said that its directors did not create its committee but did not say who had. Another reported that the president had created the committee but that the directors had approved the action. It should be noted that a by-law giving the power of creation to someone other than the directors may be invalid. *Stiegerwald v. A. M. Stiegerwald Co.*, 9 Ill. App. 2d 31, 132 N.E.2d 373 (1955).

11% had no specific by-law or charter authorization for executive committee creation.

The survey further indicated that the power to appoint original members and to fill vacancies on the executive committee is also vested in the board of directors.²² However, in a small number of instances, the executive committee is given the power to fill vacancies. The Conference Board Record and the National Industrial Conference surveys reported that the by-laws of their respondent companies contained provisions for alternates to be appointed by the board of directors, either as they are needed or at the same time the regular committee members are appointed.

The statutes usually prescribe how the directors are to exercise their power to create executive committees. Most expressly require a majority of the board to act in the creation,²³ and several enumerate the way in which that majority is to be determined.²⁴ Some statutes, on the other hand, do not specifically indicate the portion of the board which must act to establish a committee,²⁵ but presumably rely on the general statute specifying requirements for board action.²⁶ In addition, Minnesota requires unanimous board action to create an executive committee,²⁷ as does Oklahoma when the charter or by-laws fail to specifically authorize the use of such committees.²⁸ Two further restrictions on the board of directors' power to create an executive committee relate to the proper number and the type of members being appointed. Although a majority of statutes require that executive committees consist of two or more mem-

22. While there are no cases on the vacancy problem, some statutes do deal with it. Three of these allow the committee to fill its own vacancies. DEL. CODE ANN. tit. 8, § 141(c) (Supp. 1966); MD. ANN. CODE art. 23, § 59 (1966); W. VA. CODE ANN. § 31-1-16 (Supp. 1966). Three others reserve that power to the board of directors. LA. REV. STAT. ANN. § 12:34(C)(7) (1950); N.Y. BUS. CORP. LAW § 712(a)(2) (McKinney 1963) (directors can appoint alternates to fill vacancy); OHIO REV. CODE ANN. § 1701.63(B) (Page 1964) (directors can appoint alternates).

23. *E.g.*, DEL. CODE ANN. tit. 8, § 141(c) (Supp. 1966); WIS. STAT. ANN. § 180.36 (Supp. 1967). *See* CONN. GEN. STAT. REV. § 33-318 (1962), which allows by-laws to require more than a majority.

24. *E.g.*, COLO. REV. STAT. ANN. § 31-5-7 (1963), ". . . a majority of the number of directors fixed by the by-laws, or in the absence of a by-law fixing the number of directors, then the number stated in the articles of incorporation. . . ."

25. *E.g.*, CAL. CORP. CODE § 822 (Deering 1962); N.M. STAT. ANN. § 51-2-14 (1962).

26. *E.g.*, W. VA. CODE ANN. § 31-1-16(b) (Supp. 1966) (majority unless by-laws otherwise provide).

27. MINN. STAT. ANN. § 301.28(4)(8) (Supp. 1966).

28. OKLA. STAT. ANN. tit. 18, § 1.38(7) (1953). *See also* OKLA. STAT. ANN. tit. 18, § 1.36 (1953).

bers,²⁹ some require three members,³⁰ one requires only one member,³¹ and several statutes are silent on this point.³²

Most state statutes provide that only directors are eligible for membership on executive committees.³³ This requirement was presented to the court in *Stiegerwald v. A. M. Stiegerwald Co.*³⁴ A deadlock occurred in the board of directors of a closely held corporation, and to circumvent the deadlock, the board appointed an executive committee of prominent non-director businessmen to fix officer salaries.³⁵ The plaintiff sued to enjoin the payment of the salaries the committee fixed and the appellate court affirmed the injunction granted by the lower court on the ground that the executive committee, composed of non-directors, could not act for the corporation. Noting that the Illinois corporation law provided for executive committees of two or more directors,³⁶ the court held that to allow non-directors to act as members of such committees would be a delegation of corporate authority to a group not elected by the shareholders, a result contrary to the state policy guaranteeing shareholders the power to elect those who are to act for them.

2. Control

Because the board of directors is entrusted with the management of the corporation,³⁷ and because executive committees are created by the directors to aid in this management function, there should be no question that the board may control the executive committee. However, some jurisdictions have codified this implied control in an attempt to eliminate any doubts as to the relative power of the board of directors and the

29. *E.g.*, ALASKA STAT. § 10.05.195 (1962); MO. REV. STAT. § 351.330 (1959); TENN. CODE ANN. § 48-406 (1964); VA. CODE ANN. § 13.1-40 (1964).

30. ARK. STAT. ANN. § 64-306 (1966); N.Y. BUS. CORP. LAW § 712 (McKinney 1963); VT. STAT. ANN. tit. 11, § 223 (1959).

31. NEV. REV. STAT. § 78.125 (1963).

32. IOWA CODE ANN. § 496A.39 (Supp. 1966); WASH. REV. CODE ANN. § 23A.08.400 (Supp. 1966) (effective July 1, 1967); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966).

33. *E.g.*, CONN. GEN. STAT. REV. § 33-318 (1962); UTAH CODE ANN. § 16-10-39 (1962); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966). *But see* HAWAII REV. LAWS § 172-97 (1955); ME. REV. STAT. ANN. tit. 13, § 371 (1964); N.H. REV. STAT. ANN. § 294:89 (1966); N.M. STAT. ANN. § 51-2-14 (1962).

34. 9 Ill. App. 2d 31, 132 N.E.2d 373 (1955).

35. This roundabout method of fixing salaries was attempted because the existing board members were ineligible to vote on that matter directly as they were interested therein.

36. ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966).

37. *See* note 8 *supra*.

executive committee.³⁸

Control and supervision take several forms, some or all of which are used by the reporting companies. The respondents were almost evenly divided as to the existence of a veto power in the board of directors over committee action—a small majority reporting that such a power does exist.³⁹ There was a similar division as to the existence of informal control of committee action by requiring consultation between the board and the committee before the latter acts—a small majority indicating that no such requirement exists.⁴⁰ Nearly one-third of the reporting companies indicated that their boards of directors have the power to specify those areas in which the committee is to act, and all but four indicated that the board reviews the work of the executive committee, either by ratifying its actions or by approving the minutes of the committee meeting at the next board meeting. Despite these controls on committee action, only eighteen companies reported such extensive director control that director approval was required to put committee action into effect.

The Conference Board Record survey found that action taken by the executive committees of one-fifth of its respondents had to be formally approved by the full board of directors, while for other respondents, the board had veto power over committee action even though it did not need to ratify it. Self-imposed restraints were also reported, such as committee non-action in areas reserved for director action and the necessity of contacting board members for their opinions before the committee took action. The National Industrial Conference survey indicated the most widespread practice was the requirement that the committee report its actions to the board; some of its respondents indicated that committee action was submitted to the directors for approval even though such submission was not required. In addition, many indicated that the board of directors had modification or veto powers over committee action—provided that the rights of third parties had not intervened.

Board of director delegation of authority to an executive committee does not relieve the board of its responsibility for the action taken by the executive committee. *De Met's Inc. v. Insull*,⁴¹ was a suit by the holders

38. *E.g.*, MINN. STAT. ANN. § 301.28(4)(8) (Supp. 1966) (committee subject to control and direction of the board); OHIO REV. CODE ANN. § 1701.63(c) (Page 1964).

39. Many of those reporting such a power indicated it was qualified by the proviso that no rights of third parties had intervened since the disputed action was taken.

40. Among those which reported such consultation, several stated that it existed only regarding large committee appropriations or otherwise important resolutions; many explained its absence as the result of having all director committees so that the committee knows the board's wishes.

41. 122 F.2d 755 (7th Cir. 1941).

of corporate notes against the directors for the improper pledge of assets and declaration of dividends, both of which had been authorized by the executive committee. In reversing a judgment for the directors, the court held that the directors had participated in the declaration under the state statute since they gave the committee the power to declare the dividend. The cases imply that the directors may delegate their work but not their responsibility to an executive committee, so that if the directors choose to rely on such a committee they do so at their own risk, regardless of whether or not they are members of the committee.⁴² To prevent any arguments to the contrary, the Model Act⁴³ and a large group of state statutes provide that: "The designation of such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility or liability imposed upon it or him by law."⁴⁴

B. *Procedures and Mechanics of Executive Committees*

1. *Frequency of Meetings*

The majority of the reporting companies' executive committees meet "when necessary," that is, a meeting can be called at will. The other committees meet on a regular schedule—sixteen companies reported meeting monthly, twelve weekly, six twice weekly, one tri-weekly, and one reported meeting daily. Other frequencies reported were quarterly, bi-monthly, infrequently, and during emergencies. The National Industrial Conference survey indicated that committees of two-fifths of its manufacturing companies meet irregularly—as needed or as called. The others meet regularly with monthly, weekly, and quarterly meetings respectively being the most common; the overall frequency of meetings ranged from daily to annually. As compared to the frequency of director's meetings,⁴⁵ executive committee meetings are usually held more often. In addition, the frequency of executive committee meetings is made more flexible in that often meet-

42. *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. 303, 118 N.Y. Supp. 758 (Sup. Ct. 1909); see *De Met's Inc. v. Insull*, 122 F.2d 755 (7th Cir. 1941); *Williams v. McKay*, 46 N.J. Eq. 25, 18 Atl. 324 (Ch. 1889). Both *Kavanaugh* and *Williams* used the alternate rationale that it was the responsibility of the directors and the committee members to exercise due care in supervising the committee and also the officers who had been appointed to manage the corporation on a daily basis.

43. ABA-ALI MODEL BUS. CORP. ACT § 38 (1966).

44. COLO. REV. STAT. ANN. § 31-5-7 (1963); ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); MO. REV. STAT. § 351.330 (1959); N.C. GEN. STAT. § 55-31 (1965); cf. N.Y. BUS. CORP. LAW § 712(c) (McKinney 1963).

45. Most boards of directors in these companies with executive committees meet quarterly, with a smaller number meeting monthly, twice a month, only as called; and none meet weekly.

ings are held only when necessary. Furthermore, board meetings in companies with executive committees were, as a whole, held less frequently than board meetings in companies without committees.⁴⁶

2. *Notice Requirements*

In *Hayes v. Canada, Atl. & Plant S.S. Co.*,⁴⁷ two of the three executive committee members walked into the office of the third and commenced a meeting with their two votes; they amended the by-laws to reduce the committee membership to two and then authorized payment of salaries to themselves. In the suit by the corporation to recover the salaries paid, the court held non-compliance with the common-law reasonable time notice requirements for meetings of the board of directors and committees of the board rendered the executive committee meeting invalid. Furthermore, the failure to give notice to every member prior to a special committee meeting will invalidate the committee's action even though a majority of the committee received notice.⁴⁸ There is no statutory substitute for this common-law notice requirement.

In practice, few companies require any notice to be given executive committee members for regular meetings; of those which do, most require notice of from one to five days, with 4 expressly requiring the common-law reasonable notice.⁴⁹

3. *Quorum Requirements*

In the absence of a contrary statutory, charter, or by-law provision, the general rule for executive committees is the same as for boards of directors⁵⁰—a majority of the body constitutes a quorum to transact business.⁵¹ In

46. The frequency of board meetings in companies not using executive committees was most often monthly, with somewhat fewer meeting quarterly, several bi-monthly, and only 2 "as necessary."

47. 181 Fed. 289 (1st Cir. 1910).

48. *Close v. Bricton Mfg. Co.*, 43 F.2d 869 (D. Neb. 1930); *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N.J. Eq. 568, 14 Atl. 907 (Ct. Err. & App. 1888) (casual meeting). See also *Wisconsin Town Mut. Reins. Co. v. Calumet County Mut. Fire Ins. Co.*, 224 Wis. 109, 271 N.W. 51 (1937).

49. As to board of director meetings, nearly one half the respondents reported no notice requirements for regular board meetings. Of those requiring notice for such meetings, 2 required reasonable notice and 13 required two days notice; the others' requirements varied from one to thirty days, sometimes depending on the method of notification—mail or phone.

50. *Marshall v. Industrial Fed'n of America*, 84 N.Y. Supp. 866 (App. Term 1903); see *Young v. Canada, Atl. & Plant S.S. Co.*, 211 Mass. 453, 97 N.E. 1098 (1912); *Burleigh v. Ford*, 61 N.H. 360 (1881). But see *Tracy v. Guthrie County Agric. Soc'y*, 47 Iowa 27 (1877) (alternate ground).

51. *Canada-Atlantic & Plant S.S. Co. v. Flanders*, 145 Fed. 875 (1st Cir. 1906); *Peurifoy v. Loyal*, 154 S.C. 267, 151 S.E. 579 (1930). cf., *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 28 N.E. 245 (1891) (committee of public body).

determining if the required quorum exists, only those members who are not interested in the transaction under consideration are counted.⁵² Statutes in Arkansas⁵³ and Ohio⁵⁴ specifically require a majority quorum for valid committee action, while Massachusetts⁵⁵ gives the directors the power to determine committee quorum requirements. The survey indicated that of the 101 companies which had executive committees, 85 required a simple majority quorum for valid committee action. Of the companies with other committee quorum requirements, 1 reported that the required quorum was one-third, several reported that it was one-half, and 5 reported that it was unanimous attendance.⁵⁶ The Conference Board Record survey found that almost all companies had majority quorum requirements but in several the requirement was an informal one. For four companies, a quorum consisted of all the committee members, and one committee reportedly had no quorum requirements.⁵⁷

Although generally formal action by a majority of the quorum is required to bind the corporation,⁵⁸ the courts have, under some circumstances,

52. *Marshall v. Industrial Fed'n of America*, 84 N.Y. Supp. 866 (App. Term 1903); *Peurifoy v. Loyal*, 154 S.C. 267, 151 S.E. 579 (1930). *See also* *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N.J. Eq. 568, 14 Atl. 907 (Ct. Err. & App. 1888).

53. ARK. STAT. ANN. § 64-306(C) (1966) (unless by-laws or charter provide otherwise).

54. OHIO REV. CODE ANN. § 1701.63(D) (Page Supp. 1964) (unless by-laws or directors specify otherwise).

55. MASS. GEN. LAWS ANN. ch. 156B, § 55 (Supp. 1966) (except as otherwise provided in charter or by-laws).

56. In a majority of cases, these quorum requirements were imposed by a provision in the corporate by-laws, one each was imposed by the corporate charter and the state corporation law, several were imposed by a board of director resolution, and 3 were imposed by the executive committee itself.

Once the required quorum exists, all but two responding companies reported that a majority of those present can bind the committee, and thereby the corporation; however, several respondents require that the majority include at least four or at least two non-employees or at least one-third of the entire committee. One company reported a one-third requirement for committee action once a quorum existed; however, one company required unanimous agreement. The like requirement for board of director action was, similarly, a majority of those constituting the quorum, with only 2 companies requiring less—one-third of those present.

57. These results can be compared with board of director quorum requirements in companies having an executive committee, of which nearly two-thirds had majority quorum requirements. Thirteen required only one-third, one required only one-fifth, several required exactly one-half, and none required unanimous attendance. The board quorum requirements were almost exclusively imposed by a by-law provision, only 2 being imposed by the corporate charter, and eleven by the state corporation law either alone or in conjunction with by-law and charter requirements.

58. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 28 N.E. 245 (1891); *Peurifoy v. Loyal*, 154 S.C. 267, 151 S.E. 579 (1930).

held that the majority need not affirmatively act together in order to bind the corporation; thus, one committee member may act for the committee if his action receives either actual or tacit approval.⁵⁹ Informal action by the majority of the quorum may be valid if the committee has customarily been meeting or acting informally,⁶⁰ or where it is clear that the committee approved of the action.⁶¹ Also, no formal committee action was required when without a vote it was clear a majority of the committee wanted a resolution adopted,⁶² or when an authorization for a contract was oral and not in the minutes of the meeting.⁶³

Although none of the statutes presently authorize such committee conduct, several do allow the committee to act without a formal meeting.⁶⁴ To prevent abuses of this power by a committee minority, these statutes limit the circumstances under which a meeting may be avoided by allowing the by-laws or charter⁶⁵ of the company to restrict this power, or by requiring all⁶⁶ or a majority⁶⁷ of the committee members to agree in writing to such a procedure.⁶⁸ Thus, even if the committee can act without formally meeting, the quorum requirements for valid committee action cannot be circumvented.

4. *Miscellaneous*

Other questions regarding committee procedure include where the committee is to meet and whether non-members of the committee are allowed to attend the meeting. In practice, only 6 of the respondents with executive committees reported that their committees were authorized to meet only at the general offices of the corporation. Of the 88 respondents whose

59. *John A. Roebling's Sons Co. v. Barre & Montpelier Traction Power Co.*, 76 Vt. 131, 56 Atl. 530 (1903); *Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, 33 Wash. 2d 169, 205 P.2d 597 (1949).

60. *Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, *supra* note 59; *cf.*, *Wingate v. Bercut*, 146 F.2d 725 (9th Cir. 1944).

61. *Young v. United States Mortgage & Trust Co.*, 214 N.Y. 279, 108 N.E. 418 (1915); *Title Ins. Co. v. Howell*, 158 Va. 713, 164 S.E. 387 (1932).

62. *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588 (1911).

63. *Storer v. Florida Sportservice, Inc.*, 125 So. 2d 906 (Fla. Dist. Ct. App. 1961).

64. ARK. STAT. ANN. § 64-306(c) (1966); DEL. CODE ANN. tit. 8, § 141(g) (Supp. 1966); MASS. GEN. LAWS ANN. ch. 156B, § 55 (Supp. 1966); MINN. STAT. ANN. § 301.28(4)(7) (Supp. 1966); OHIO REV. CODE ANN. § 1701.63(D) (Page 1964); PA. STAT. ANN. tit. 15, § 2852-402(7) (Supp. 1966).

65. Pennsylvania only includes by-laws. PA. STAT. ANN. tit. 15, § 2852-402(7) (Supp. 1966). Massachusetts allows the directors to permit action without meetings. MASS. GEN. LAWS ANN. ch. 156B, § 55 (Supp. 1966).

66. *E.g.*, ARK. STAT. ANN. § 64-306(c) (1966).

67. OHIO REV. CODE ANN. § 1701.63(D) (Page 1964).

68. Massachusetts does not require such a written authorization.

committees could meet elsewhere, over half indicated that they had done so, although some responses were qualified by a "rarely do so." Seventy-five of the companies with executive committees said that directors and officers who were not committee members were, nevertheless, invited to attend committee meetings. Of these 75, almost all indicated that these non-committee members were invited to attend meetings only occasionally. Several, however, indicated they were invited "often", while 6 indicated such an invitation had never been extended to non-members. The Conference Board Record survey found a similar invitational practice among its respondents, who listed board familiarization with committee activities as the reason for inviting non-member directors, and improved communications between the committee and management as the reason for inviting non-member officers.

C. *Executive Committee Authority*

In examining the power of an executive committee to bind the corporation by its actions, two different problems must be distinguished and analyzed: (1) If the committee is created for specific purposes, has it acted in a way which is not authorized by its limited grant of power from the board of directors? (2) If the grant of power to the committee includes the full power of the board of directors, is the committee's authority to bind the corporation legally as great as that of the board?

1. *Specific Purpose Committees*

a. *non-executive standing committees and non-standing executive committees.* Not all committees appointed for limited purposes are executive committees. Non-standing and temporary committees of the board of directors are appointed to work in specific areas of the business rather than to manage the entire business. They receive their grant of authority from director resolutions which establish the boundaries of their authority. When such a committee purports to act for the corporation, the court examines its action to determine if it is within the scope of the committee's authorized power.⁶⁹ In *Leggett v. New Jersey Mfg. & Banking Co.*,⁷⁰ a suit to foreclose a mortgage, the corporation based its defense on its finance committee's lack of authority to mortgage corporate property. The court upheld this contention on the grounds that a finance committee's powers are limited to financial affairs, which do not include mortgaging prop-

69. See, e.g., *Skinner v. Walter A. Wood Mowing & Reaping Mach. Co.*, 140 N.Y. 217, 35 N.E. 491 (1893).

70. 1 N.J. Eq. 541 (Ch. 1832).

erty.⁷¹ Similar inquiry is made, and similar results are reached, when the committee is a non-standing special committee of the directors. In *Greensboro Gas Co. v. Home Oil & Gas Co.*,⁷² a committee which was created and empowered to make an agreement and then report on it to the board of directors was said to have exceeded its limited authority by agreeing but failing to report. A committee authorized to purchase land and give a certain type of corporate note in return was held, in *Chestnut-Hill Reservoir Co. v. Chase*,⁷³ not empowered to purchase the land and give a different type of note.

b. executive committees with advisory powers. The by-laws of one company with an executive committee which is empowered only to advise the directors and make recommendations to them based on its studies read:

(2) The Committee shall review any matter affecting the Corporation and shall formulate and develop major policies of the Corporation, including policies covering all aspects of the corporate financing, for submission to the Board of Directors. The Committee may also inquire, through the President, into any and all aspects of the business of the corporation. The Committee shall have no duties or responsibilities other than those expressly set forth in this resolution.

(3) The Committee shall make recommendations to the Board of Directors concerning the appointment, duties, and compensation of all officers and divisional executives of the Corporation. . . .

This company's committee is empowered only to recommend action to the directors; it can take no action by itself. Five other respondents' committees were of this general nature; they had authority only to study special problems designated by the directors and report their findings to the board of directors along with their recommendations for board action. Some of the problems studied by these committees were: possibilities of merger or

71. Other cases have held that an auditing committee having the power to pay or reject claims against the corporation exceeds its authority and therefore does not bind the corporation when it attempts to rescind a corporate contract, and that a business committee has no power to issue notes of the corporation. *Skinner v. Walter A. Wood Mowing & Reaping Mach. Co.*, 140 N.Y. 217, 35 N.E. 491 (1893); *Chemical Nat'l Bank v. Wagner*, 93 Ky. 525, 20 S.W. 535 (1892).

72. 222 Pa. 4, 70 Atl. 940 (1908) (dictum).

73. 14 Conn. 123 (1841). Parenthetically, it might be noted that in at least two cases, committee action was held binding on the corporation only because the powers given the committee were narrow and for a specific purpose. In *Kaufman v. Shoenberg*, 33 Del. Ch. 211, 91 A.2d 786 (1952) and *Elster v. American Airlines, Inc.*, 39 Del. Ch. 476, 167 A.2d 231 (1962), committee actions establishing the procedures and beneficiaries of stock option plans were upheld against the attack that under the statute only the board of directors could issue stock. In both cases, the court found no unauthorized delegation of the director's duty to issue shares because the committees were not to issue the shares, but were only empowered to determine the terms and beneficiaries of the issuance.

acquisition, necessity of borrowing or investing funds, and advisability of declaring dividends. The meetings of one such committee, which was empowered to act for the directors, but which in practice only advised it, were said to "provide the President an opportunity to discuss important policy matters with the outside Board members."⁷⁴

The Conference Board Record survey reported the use of such advisory committees in "a very few firms." In one such company, the advisory committee was used to formulate policies, review long-range plans, and evaluate general operations and development. The National Industrial Conference survey, in contrast, found the use of advisory committees by manufacturing companies much more prevalent; they were characterized as a screening element for the board, a sounding board for the discussion of future action, or a coordinating and directing tool of management.

Because this type of committee advises its board of directors and does not purport to act for the corporation, the question of the limits of its authority to bind the company is moot.⁷⁵

2. *General Purpose Committees*

It is the general purpose committee which the term "executive committee" usually connotes; specific purpose committees of the board of directors are relatively rare. For this reason, general purpose executive committees are the focal point of the inquiry into the authority of director committees.

74. The activities of such a committee of a large corporation were described as considering:

proposed policies, projects and programs relating to the management of the Corporation's business that are submitted to it by the full Board and by members of top management, for detailed study and review. Formulates recommendations to the Board and members of management with respect to these matters. . . . For instance, one of the principal functions of the Committee is the screening and refining of policies that are to be presented to the full Board, in order to conserve time of the Board.

75. There is a third type of specific purpose committee—a committee with only those powers delegated to it from time to time by the directors relating to a specific task or tasks, such as approving a certain capital expenditure or a departmental budget. At least three respondents had executive committees which had authority to bind the corporation only in specific areas. One of these committees had the powers to approve capital expenditures up to a fixed amount and to "take actions to comply with legal requirements;" another had the power to authorize expenditures and make charitable contributions up to a stated amount; the third had the powers to fix compensation of officers, open and close bank accounts, authorize replacement of stock certificates, authorize preparation of documents, and designate individuals to execute company forms and documents used in connection with corporate securities. The Conference Board Record survey disclosed several committees which only had power to perform specifically delegated duties and several committees whose authority was limited to either a particular period of time or to certain functions, such as compensation of employees earning more than a stated amount.

a. statutes. Most statutes which permit the use of executive committees also deal with their authority.⁷⁶ Some of these statutes permit the corporation to grant the committee "all of the authority of the board of directors."⁷⁷ However, because this is an extremely broad grant of authority which may include the power to make decisions affecting the very existence of the corporation,⁷⁸ all of these statutes either limit or permit the corporation to limit this authority. Specific powers may be withheld or the committee may have the authority of the board of directors, but only "to the extent provided"⁷⁹ in the by-laws,⁸⁰ certificate of incorporation and by-laws,⁸¹ resolution of the board of directors establishing the committee,⁸² resolution and by-laws,⁸³ or most commonly, in the resolution, by-laws, and charter.⁸⁴ Thus, under these statutes, the directors, shareholders, or both, through their power to pass or amend by-law or charter provisions, can grant either full or limited powers to the committee.⁸⁵

When specific powers are denied by statute, the shareholders and directors may not grant full powers to the committee. Several states legislatively deny the committee power to amend the articles of incorporation or by-laws, adopt a plan of merger or consolidation, recommend to the shareholders a dissolution or a sale, lease, exchange or other disposition of substantially all the corporate assets (except in the ordinary course in business).⁸⁶ Other less extraordinary powers which have been denied include

76. *E.g.*, DEL. CODE ANN. tit. 8, § 141(c) (Supp. 1966); IOWA CODE ANN. § 496A.39 (Supp. 1966.); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966). *But see* HAWAII REV. LAWS §172-97 (1955); ME. REV. STAT. ANN. tit. 13, § 371 (1964); N.M. STAT. ANN. § 51-2-14 (1962); VT. STAT. ANN. tit. 11, § 223 (1959). *See also* MASS. GEN. LAWS ANN. ch. 156B, § 55 (Supp. 1966) (directors may delegate some or all of their powers).

77. Mo. REV. STAT. § 351.330 (1959); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966).

78. *See* Fensterer v. Pressure Lighting Co., 85 Misc. 621, 149 N.Y. Supp. 49 (N.Y. City Ct. 1914).

79. *E.g.*, COLO. REV. STAT. ANN. § 31-5-7 (1963); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966).

80. NEV. REV. STAT. § 78.125 (1963).

81. N.J. STAT. ANN. § 14:7-4 (1937).

82. MICH. STAT. ANN. § 21.13(4)(c) (1963).

83. Mo. REV. STAT. § 351.330 (1959).

84. *E.g.*, N.Y. BUS. CORP. LAW § 712(a) (McKinney 1963); TEX. BUS. CORP. ACT art. 2.36 (1956).

85. *E.g.*, DEL. CODE ANN. tit. 8, §§ 109, 241, 242 (Supp. 1966); ABA-ALI MODEL BUS. CORP. ACT §§ 25, 54 (1966).

86. IOWA CODE ANN. § 496A.39 (Supp. 1966); MISS. CODE ANN. § 5309-77 (Supp. 1966); ORE. REV. STAT. § 57.206 (1965); S.C. CODE ANN. § 12-18.11 (Supp. 1966); WASH. REV. CODE ANN. § 23A.08.400 (Supp. 1966); WYO. STAT. ANN. § 17.36.37 (1965); ABA-ALI MODEL BUS. CORP. ACT § 38 (1966). *See also* ARK. STAT. ANN. § 64-306(A)(6) (1966).

the power to: elect officers,⁸⁷ fill vacancies on the board of directors⁸⁸ or the committee,⁸⁹ declare dividends,⁹⁰ authorize the issuance of stock,⁹¹ call shareholders meetings,⁹² fix committee member compensation,⁹³ repeal or alter a director resolution declared to be non-amendable,⁹⁴ recommend to shareholders any proposition requiring their approval,⁹⁵ change the principal office of the corporation,⁹⁶ remove officers or directors,⁹⁷ authorize reacquisition of stock,⁹⁸ and create new classes of stock.⁹⁹ The areas of authority denied are generally those over which the legislatures have felt the directors alone should have power because of their importance to the corporation.¹⁰⁰ It should be noted that the statutorily denied powers are minimum limitations on committee authority; nothing would prevent the shareholders or directors from denying other powers.

b. cases.

i. ratification and estoppel. In discussing the judicially imposed limits on the authority of an executive committee granted full board powers, some cases have relied on ratification of committee action as the basis of

87. ARK. STAT. ANN. § 64-306(A)(1) (1966); ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); MASS. GEN. LAWS ANN. ch. 156B, § 55(e) (Supp. 1966); S.D. CODE § 11.0707 (1939); WIS. STAT. ANN. § 180.36 (Supp. 1967).

88. ARK. STAT. ANN. § 64-306(A)(1) (1966); MASS. GEN. LAWS ANN. ch. 156B, § 55(f) (Supp. 1966); N.Y. BUS. CORP. LAW § 712(2) (McKinney 1963); OHIO REV. CODE ANN. § 1701.63(A) (Page 1964); WIS. STAT. ANN. § 180.36 (Supp. 1967).

89. ARK. STAT. ANN. § 64-306(A)(1) (1966); N.Y. BUS. CORP. LAW § 712a(2) (McKinney 1963); OHIO REV. CODE ANN. § 1701.63(A) (Page 1964); WIS. STAT. ANN. § 180.36 (Supp. 1967).

90. CAL. CORP. CODE § 822 (Deering 1962); ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); MD. ANN. CODE art. 23, § 59 (1966); MASS. GEN. LAWS ANN. ch. 156B, § 55(h) (Supp. 1966); WIS. STAT. ANN. § 180.36 (Supp. 1967).

91. ARK. STAT. ANN. § 64-306(A)(3) (1966); MD. ANN. CODE art. 23, § 59 (1966); MASS. GEN. LAWS ANN. ch. 156B, § 55(c) (Supp. 1966).

92. ARK. STAT. ANN. § 64-306(A)(4) (1966).

93. ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); N.Y. BUS. CORP. LAW § 712(3) (McKinney 1963).

94. ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); N.Y. BUS. CORP. LAW § 712(5) (McKinney 1963).

95. MD. ANN. CODE art. 23, § 59 (1966); N.Y. BUS. CORP. LAW § 712(1) (McKinney 1963).

96. MASS. GEN. LAWS ANN. ch. 156B, § 55(a) (Supp. 1966).

97. ILL. ANN. STAT. ch. 32, § 157.38 (Smith-Hurd Supp. 1966); MASS. GEN. LAWS ANN. ch. 156B, § 55(g) (Supp. 1966).

98. MASS. GEN. LAWS ANN. ch. 156B, § 55(i) (Supp. 1966).

99. MASS. GEN. LAWS ANN. ch. 156B § 55(d) (Supp. 1966).

100. See ABA-ALI MODEL BUS. CORP. ACT § 38, comment (1966).

101. Comment, *Corporations—The Executive Committee and Corporate Organization—Scope of Powers*, 42 MICH. L. REV. 133, 145 (1942).

its validity.¹⁰¹ Upon the familiar agency ground that subsequent ratification by a principal makes an otherwise unauthorized act of an agent binding upon the principal,¹⁰² acts of committees have been held ratified by directors¹⁰³ or shareholders¹⁰⁴ so as to bind the corporation. Thus, the filing of a petition in bankruptcy,¹⁰⁵ the fixing of tolls to use corporate streams,¹⁰⁶ the giving of security for a loan,¹⁰⁷ the mortgaging of corporate property,¹⁰⁸ the employing of a collection attorney,¹⁰⁹ the joining of a reinsurance group,¹¹⁰ the assigning of a bond and mortgage by a bank,¹¹¹ and the executing of corporate contracts¹¹² have been upheld on a ratification theory against the allegation that the act of the committee under consideration was beyond its authorized power. Even a lease of corporate property to another corporation for 999 years was upheld when ratified by shareholders.¹¹³ In addition, a similar agency principle, estoppel, has been used to prevent a board of directors from denying the existence of an executive committee's authority to act after the corporation had accepted the benefits of the unauthorized act.¹¹⁴ Although these validation processes, ratification and estoppel, will protect those dealing with executive committees, and are arguably valuable to commercial intercourse,¹¹⁵ their presence in a case relegates any discussion of committee authority to statements of dictum, or at best, alternate holdings. Thus, cases based on these theories do not necessarily establish precedent upon the basis of which committee authority problems can be solved.

ii. *agency theory.* It is possible to view the relationship between the shareholders, the board of directors, and the executive committee of a

102. RESTATEMENT (SECOND) OF AGENCY §§ 82, 93 (1957).

103. *E.g.*, *Boyce v. Chemical Plastics, Inc.*, 175 F.2d 839 (8th Cir.), *cert. denied*, 338 U.S. 828 (1949).

104. *E.g.*, *Cabot, Inc. v. Gas Prods. Co.*, 93 Mont. 497, 19 P.2d 878 (1933).

105. *Boyce v. Chemical Plastics, Inc.*, 175 F.2d 839 (8th Cir.), *cert. denied*, 338 U.S. 828 (1949).

106. *Black River Improvement Co. v. Holway*, 85 Wis. 344, 55 N.W. 418 (1893).

107. *Cabot, Inc. v. Gas Prods. Co.*, 93 Mont. 497, 19 P.2d 878 (1933).

108. *Burrill v. President, Nahant Bank*, 43 Mass. (2 Met.) 163 (1840).

109. *Burns v. Valley Bank*, 94 Cal. App. 254, 271 Pac. 107 (1928).

110. *Wisconsin Town Mut. Reins. Co. v. Calumet County Mut. Fire Ins. Co.*, 224 Wis. 109, 271 N.W. 51 (1937).

111. *Palmer v. Yates*, 3 Sandf. (N.Y.) 137 (Super. Ct. 1849).

112. *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N.J. Eq. 568, 14 Atl. 907 (Ct. Err. & App. 1888).

113. *Union Pac. Ry. v. Chicago, R. I. & Pac. Ry.*, 163 U.S. 564 (1895).

114. *Tilden v. Goldy Mach. Co.*, 9 Cal. App. 9, 98 Pac. 39 (1908).

115. Comment, *Corporations—The Executive Committee in Corporate Organization—Scope of Powers*, 42 MICH. L. REV. 133, 145 (1942). This is aside from its value as a corporate counselling tool to insure valid committee action.

corporation as that of principal-agent-subagent, with authority being delegated to the directors who re-delegate it to the committee.¹¹⁶ If such is the case, the agency principle, that one who has been delegated a power involving non-mechanical tasks cannot, in the absence of agreement, re-delegate it,¹¹⁷ could result in an inability on the part of the directors to delegate any authority to the committee. Several early cases which so viewed the corporation invalidated any delegation of power by the board.¹¹⁸ The weight of authority, however, upheld delegation of power to a committee upon the rationale that the powers of the directors were both delegated and original.¹¹⁹

Neither of the agency-based positions is currently used by the courts. Other than a brief mention of this theory in some later cases,¹²⁰ it has been discarded in favor of theories which view director committees as *sui generis* and attempt to deal with what ought to be the *limits* of their authority. The statutory acceptance of executive committees rendered obsolete the views which denied the power of the directors to delegate authority.¹²¹

iii. *ordinary business limitations.* Statutory language¹²² which establishes the authority of executive committees as "all the authority of the board of directors,"¹²³ has not pre-empted judicial consideration of whether executive committees can act for and on behalf of the corporation in any situation in which the board of directors can act. It is this problem with

116. Comment, *Corporations—The Executive Committee in Corporate Organization—Scope of Powers*, 42 MICH. L. REV. 133 (1942).

117. RESTATEMENT (SECOND) OF AGENCY § 18 (1957).

118. *Gillis v. Bailey*, 21 N.H. 149 (1850); *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N.H. 205 (1841).

119. *Burrill v. President, Nahant Bank*, 43 Mass. (2 Met.) 163 (1840); *Manson v. Curtis*, 223 N.Y. 313, 119 N.E. 559 (1918); *Hoyt v. Thompson's Executor*, 19 N.Y. 207 (1859); *Helms v. Home Owners' Loan Corp.*, 129 Tex. 121, 103 S.W.2d 128 (1937). See also *Cassidy v. Uhlmann*, 170 N.Y. 505, 63 N.E. 554 (1902) (dictum).

120. E.g., *Helms v. Home Owners' Loan Corp.*, 129 Tex. 121, 103 S.W.2d 128 (1937).

121. *But see* section on ministerial tasks, notes 137-143 *infra* and accompanying text. The doctrine of non-delegation by an agent to a subagent was, even in the early cases, subject to the exception which allowed such delegation if it were agreed to by the principal. The statutory allowance of the use of such committees which was reflected in corporate charters and by-laws brings the exception into effect even if the courts today were to hold to this agency view of the corporation.

122. Typical by-law and charter provisions are similarly worded. NATIONAL INDUSTRIAL CONFERENCE BD. & AMERICAN SOC'Y OF CORPORATE SECRETARIES, CORPORATE DIRECTORSHIP PRACTICES 112, 114 (1962).

123. E.g., N.Y. BUS. CORP. LAW § 712 (McKinney 1963); ABA-ALI MODEL BUS. CORP. ACT § 38 (1960).

which the courts have been primarily concerned in determining executive committee authority. In *Lawrence v. Atlantic Paper & Pulp Corp.*,¹²⁴ the corporate charter granted the executive committee all the powers of the board of directors, and the committee filed a voluntary petition in bankruptcy which the plaintiff sought to set aside as not having been filed pursuant to a director resolution. The court held that because of the charter provision the committee had become the *substitute* of the board of directors. This position has been adopted in only a few cases.¹²⁵

The majority view, that the "full powers of the board of directors" conferred upon executive committees is not without some limitation, is presented in the leading case of *Hayes v. Canada, Atl. & Plant S.S. Co.*¹²⁶ The corporation was suing its president, a director and a member of the executive committee, to recover salary and expense payments which, along with by-law changes, had been authorized by the executive committee. In affirming a judgment for the corporation, the court noted that its decision could have been based on the fact that reasonable notice had not been given to a third committee member; it nevertheless went on to challenge the defendant's contention that the executive committee had the authority to approve the payments and make the by-law changes by virtue of another by-law which gave the committee the full powers of the directors. The court reasoned:

Section 8 [of the by-laws] is expressed literally in very broad terms, in that it purports to vest the committee with the "full powers" of the board of directors. Hayes maintains that this expression "full powers" has no limitation whatever, while a true construction limits it to the *ordinary business operations of the corporation.*

. . . [T]hey proceeded in such a way that, if their actions had been

124. 298 Fed. 246 (5th Cir. 1924).

125. *Lawrence v. Atlantic Paper & Pulp Corp.*, 298 Fed. 246 (5th Cir. 1924), *Haldeman v. Haldeman*, 176 Ky. 635, 197 S.W. 376 (1917); *Sheridan Elec. Light Co. v. Chatham Nat'l Bank*, 127 N.Y. 517, 28 N.E. 467 (1891). See *Palmer v. Yates*, 3 Sandf. (N.Y.) 137 (Super. Ct. 1849) (dictum). The Supreme Court accepted this view in a dictum in *Union Pac. Ry. v. Chicago, R. I. & Pac. Ry.*, 163 U.S. 564 (1895), by upholding a 999 year lease of a railroad right of way entered into by an executive committee. The Court held that since the contracts were in the proper form, approved by an executive committee which had all the powers of the board of directors, and ratified by the shareholders, the corporation was bound. In the course of the decision, emphasis was placed on the fact that the shareholders had authorized delegation of full board powers to an executive committee by adopting such a by-law and that therefore the committee had received from the shareholders the authority to do anything the board could, including entering into the instant contract. See also *Ford v. Magee*, 160 F.2d 457 (2d Cir. 1947).

126. 181 Fed. 289 (1st Cir. 1910).

effectual, the two men, acting in their own pecuniary interests, would have absorbed the entire powers of the corporation for an indefinite period. . . . It is certainly intolerable to maintain that the words "full powers," . . . practically divested the directors of all their functions, and built up a new foundation for it in lieu of that formally established [W]e must hold that the matter of such compensation was specifically retained for the personal action of the directors . . . notwithstanding that there were other powers, of a general nature, which might well have vested in the executive committee, which would fully satisfy the call of the words "full powers."¹²⁷

Courts which place this judicial gloss on the phrase "full powers" have usually interpreted "ordinary business" to include only those decisions which are necessary to carry on the day-to-day operations of the corporation.

The rationale behind the "ordinary business" limitation seeks to prevent the committee from initiating radical departures from fundamental corporate policies and methods of doing business established by the board of directors. Courts following this rationale have held invalid the execution of a contract providing for control of corporate management by another corporation,¹²⁸ the execution of a contract to purchase the corporation's own stock in order to maintain its price during merger negotiations,¹²⁹ and the removal of officers elected by the board of directors.¹³⁰ However, one court has indicated that it might consider such an apparently extraordinary act as buying out a competitor to be part of a company's ordinary business.¹³¹

Other examples of committee action which the courts have found to be within the ordinary business of the corporation and therefore authorized by a "full powers" delegation include contracting to purchase wire for a

127. *Id.* at 292-93 (emphasis added).

128. *Robinson v. Benbow*, 298 Fed. 561 (4th Cir. 1924).

129. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70 (1906) ("usual" business limitation).

130. *Fensterer v. Pressure Lighting Co.*, 85 Misc. 621, 149 N.Y. Supp. 49 (N.Y. City Ct. 1914); *see Tempel v. Dodge*, 89 Tex. 69, 32 S.W. 514 (1895), in which the Texas Supreme Court held a by-law granting the executive committee the full powers of the board null and void as in conflict with a charter provision imposing management of the corporation on the directors, because the directors could delegate authority to conduct only ordinary corporate business in the face of such a charter provision; *cf. Crenshaw v. Barbour*, 162 Tenn. 235, 36 S.W.2d 87 (1931).

131. *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N.J. Eq. 568, 14 Atl. 907 (Ct. Err. & App. 1888) (dictum).

traction company,¹³² appointing an agent,¹³³ accelerating a mortgage and appointing a new trustee under a deed of trust,¹³⁴ transferring shares of stock owned by a holding company,¹³⁵ and employing a superintendent of a branch of the company's business.¹³⁶

iv. *ministerial task limitation*. Results comparable to those of the "ordinary business" limitation cases are reached by courts which hold an agency view of the corporation-director relationship.¹³⁷ They apply the agency principle¹³⁸ that, absent express authorization, the board of directors, as an agent, can redelegate only ministerial powers—those whose exercise require no discretion. While there are statements to this effect in several cases involving committee action,¹³⁹ few cases have been decided on this point alone.¹⁴⁰ These cases indicate discretionary action is to be taken only by the board.

The limitations imposed on executive committee authority by the ministerial task rationale may be identical to those imposed by the previously discussed "ordinary business" rationale. That is, if ordinary business acts

132. *John A. Roebling's Sons Co. v. Barre & Montpelier Traction Power Co.*, 76 Vt. 131, 56 Atl. 530 (1903) (dictum).

133. *Canada-Atlantic & Plant S.S. Co. v. Flanders*, 145 Fed. 875 (1st Cir. 1906). The nature of the contract and size of the company are the factors to be used in determining if the action is in the company's ordinary business or is of a matter of fundamental importance to the company. Expressing its hesitation about giving committees full director powers the court said, ". . . we do not wish to have it understood that we are committed to the legality of the constitution of an executive committee in which should be vested all the powers of the board of directors of a corporation. Respectable authors seem to be divided on that proposition." *Id.* at 879.

134. *Helms v. Home Owners' Loan Corp.*, 129 Tex. 121, 103 S.W.2d 128 (1937).

135. *Wingate v. Bercut*, 146 F.2d 725 (9th Cir. 1944).

136. *Young v. Canada, Atl. & Plant S.S. Co.*, 211 Mass. 453, 97 N.E. 1098 (1912). The court stated that the nature of the company's business allowed a delegation of authority to act in the area of ordinary business, thereby implying that some corporations, because of the business they conducted, could not even delegate this quantum of authority to a committee. *Id.* at 456, 97 N.E. at 1099.

137. See notes 116-121 *supra* and accompanying text.

138. RESTATEMENT (SECOND) OF AGENCY § 18 (1957) provides "unless otherwise agreed, an agent cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of the principal." See *Farmer's Mutual Fire Ins. Co. v. Chase*, 56 N.H. 341 (1876).

139. *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N.J. Eq. 568, 14 Atl. 907 (Ct. Err. & App. 1888); *John A. Roebling's Sons Co. v. Barre & Montpelier Traction Power Co.*, 76 Vt. 131, 56 Atl. 530 (1903); *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588 (1911).

140. In *First Nat'l Bank v. Commercial Travellers' Home Ass'n*, 108 App. Div. 78, 95 N.Y. Supp. 454 (1905), *aff'd*, 185 N.Y. 575, 78 N.E. 1103 (1906), this rationale was an alternate ground for the decision. The court held that the execution of a note for a debt of the corporation was a ministerial, as opposed to a discretionary, task and therefore could be validly delegated to a committee.

are interpreted to be acts requiring no discretion, then the results reached under both rationales would be the same.¹⁴¹ However, the ministerial task rationale would seem to be more restrictive; even if all non-discretionary acts are in the ordinary business of the corporation,¹⁴² there could very likely be ordinary business acts the performance of which requires discretion. For example, entering into a contract may be a routine business act, but deciding on its terms would be more than a ministerial task in that it could require the exercise of discretion.¹⁴³

v. *duration of authority*. Granted the existence of an executive committee's authority, there are times when that authority cannot be validly exercised. Several statutes¹⁴⁴ and many corporate by-laws¹⁴⁵ provide that the committee shall have the powers of the board of directors between the meetings of the board. Such language in the statute granting authority to the committee is construed literally. In *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*,¹⁴⁶ the defendant corporation's executive committee had approved the contract sued upon, but had done so at a meeting held two hours prior to a board of directors meeting which had previously been called. The court affirmed a dismissal of the complaint on the ground that the executive committee which had authorized the contract had acted without authority, the calling of the directors meeting having suspended the powers of the executive committee to act. By calling the director's meeting, the session of the directors had begun and during this period the executive committee could not, without usurping the director's powers, act in managing the affairs of the corporation.

vi. *delegation of authority by the committee*. The question of whether an executive committee can delegate its powers arises in those infrequent instances when the committee attempts to exercise its authorized powers

141. See *John A. Roebling's Sons Co. v. Barre & Montpelier Traction Power Co.*, 76 Vt. 131, 56 Atl. 530 (1903).

142. It would seem that all ministerial tasks would be ones performed in the ordinary business of the corporation. However, this would not be true of ministerial tasks which are necessary to carry out an extraordinary business decision. For example, the act of redeeming stock may be completely ministerial; however, it is possible that the only time the company will perform this act is pursuant to dissolution, an extraordinary occurrence.

143. See *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N.J. Eq. 568, 14 Atl. 907 (Ct. Err. & App. 1888). It might be noted that the ministerial task rationale was used before the ordinary business rationale was developed. See *San Antonio Joint Stock Land Bank v. Taylor*, 129 Tex. 335, 105 S.W.2d 650 (1937).

144. E.g., ARK. STAT. ANN. 64-306(B) (1966).

145. This was reported by a majority of the companies responding to the survey.

146. 190 N.Y. 1, 82 N.E. 730 (1907).

through an agent, usually a member of the committee.¹⁴⁷ The only reported cases¹⁴⁸ directly involving delegation of authority by an executive committee arose in New York before 1900, and despite one early statement to the contrary,¹⁴⁹ the New York courts have allowed the committee to act through an agent provided the task performed is one which entails no discretion or judgment, a ministerial task such as endorsing checks.¹⁵⁰

c. current corporate practice.

i. "full power" committees. Of the responding companies which had executive committees, forty per cent, 39 of 101, reported that their committees were granted the full powers of the board of directors while the board was not in session. Such a grant was contained in the corporation's charter, by-laws, or in the director resolution establishing the committee. A typical by-law provision granted this type of authority to an executive committee is:

During the intervals between sessions of the Board, the Executive Committee shall have, and may exercise, all the powers of the Board in the management of the business and affairs of the Corporation, including the power to authorize the seal of the Corporation to be affixed to all papers which may require it, in such manner as the Executive Committee shall deem for the best interests of the Corporation¹⁵¹

A few of these respondents, however, indicated that although their executive committees were authorized to perform any acts which their

147. *E.g.*, *Sheridan Elec. Light Co. v. Chatham Nat'l Bank*, 127 N.Y. 517, 28 N.E. 467 (1891).

148. *Sheridan Elec. Light Co. v. Chatham Nat'l Bank*, 127 N.Y. 517, 28 N.E. 467 (1891); *Olcott v. Tioga R.R.*, 27 N.Y. 546 (1863); *Caldwell v. Mutual Reserve Fund Life Ass'n*, 53 App. Div. 245, 65 N.Y. Supp. 826 (1900). *See also* *Young v. United States Mortgage & Trust Co.*, 214 N.Y. 279, 108 N.E. 418 (1915).

149. *Olcott v. Tioga R.R.*, 27 N.Y. 546 (1863) (dictum).

150. *Compare* *Sheridan Elec. Light Co. v. Chatham Nat'l Bank*, 127 N.Y. 517, 28 N.E. 467 (1891) *with* *Caldwell v. Mutual Reserve Fund Life Ass'n*, 53 App. Div. 245, 65 N.Y. Supp. 826 (1900).

151. Another by-law in the words of the governing statute provides: "The Executive Committee shall have and may exercise all and any of the powers of the Board of Directors in the management of the business and affairs of the Corporation during the intervals between the meetings of the Board of Directors. . . ."

A third shows its committee has power to advise and recommend as well as to act for the board:

The Executive Committee shall represent the Board of Directors between meetings for the purpose of consulting with the officers and giving special consideration to matters of importance affecting the policies, financing, management and operations of the business, and taking action thereon or making recommendations to the Board. . . .

board of directors were capable of performing, in practice there were limitations on this authority. Thus, even though one committee was granted full board powers, all major decisions, such as declaration of dividends, were reserved for board action. Several other committees exercised full board powers only when "an important urgent decision" was needed or when "pressing business matters" occurred between board meetings. This latter type of committee is, in effect, an emergency committee acting only to fill an immediate corporate need and not as a substitute for the board of directors.

Although most of the companies whose committees were granted full board powers did not elaborate on the types of activities their committees undertook, a study of those who did may help to define the limits of such a grant. A few stated that the full powers were used only to transact routine corporate business not affecting general corporate policy and to make recommendations to the board in areas beyond this limit. Two indicated their committees exercised their full board powers to review regularly the operations and growth of the company and to approve divisional budgets—a somewhat limited range of activities. Two others indicated that their committees limited themselves to ordinary, routine, or ministerial tasks and the performance of activities such as the limited appropriation of funds, construction of facilities, election of personnel, purchase of land, purchase of equipment and its financing, approval of expenditures contracts and leases in excess of management's authority, financial analysis, and the submission of recommendations to the board in those areas beyond the ordinary course of the company's business. The most detailed list of tasks performed by a "full power" executive committee given in the survey was:

Review corporate investment objectives; review proposed capital budget, and budget additions in excess of a stated amount or which may lead to substantial future investment or involve a change in policy; review proposed plans for financial assistance to affiliates; review matters on which an operating division seeks guidance, such as unusual contractual or financial terms which may set important precedents, investments in new lines of business or areas—ventures involving outside participation or other exceptional features, terms of settling claims or litigation, and exceptions to policy; review reports on treasury stock acquisition program; organize and appoint members to specialized committees; and decide important corporate matters not requiring action by the board, such as acquisition, lease and sale, transfer, or other disposition of property or assets, retainer budgets and additions to contribution budgets, amendments to Company policy not reserved to the board, insurance programs, public rela-

tions, granting of proxies and other actions requiring documentation of authority to third parties.

Even this wide-ranging list of duties was, however, prefaced with a statement that matters involving "major policy considerations or large financial considerations" would be referred to the board. Thus, it appears that, in practice, executive committee authority to act for the corporation usually is within the ordinary business limitation imposed by the courts.¹⁵²

The National Industrial Conference survey reported that 40% of its manufacturing corporations placed no limitations on the authority of their executive committees in their corporate charter or by-laws. However, more than three-quarters indicated that there were some limitations imposed by charter, by-laws, statutes, or board of director resolution. That survey further found that the by-laws of most large companies specifically provided for full board powers in an executive committee.

ii. "*denied power*" committees. Of the 101 responding companies with executive committees, 36 stated that their committees were given the full power of the board of directors subject to certain specific limitations imposed by their charter, by-laws, or the director resolution establishing the committee. A by-law of this type reads:

. . . The Executive Committee shall have and may exercise, during the intervals between meetings of the Board, all the powers of the Board of Directors in the management of the business and affairs of the Corporation, . . . but the Executive Committee shall not have power to fill vacancies in the Board, or to change the membership of or to fill vacancies in the committee, or to make or amend the by-laws of the Corporation.

To the same effect is a board of directors resolution establishing an executive committee which:

shall have . . . the full powers of the board of directors in the management of the business and affairs of the Corporation in the intervals between the meetings of the board of directors . . . except that the Executive Committee shall not have the power to act on any of the following; (a) Adoption, amendment and repeal of the by-laws

The powers denied an executive committee of this type most often include the declaration of dividends, amendment or repeal of the corporate

152. In the survey, several companies' executive committees were specifically restricted by the instruments creating them to the "ordinary and regular business and affairs of the company" except as other duties and powers were specifically granted to them by the directors.

by-laws, election or removal of corporate officers, directors, or executive committee members, filling of board or committee vacancies, changes in the number of directors, and the remuneration of directors, officers or committee members. Other areas in which committees were less frequently denied the power to act were: approval of mergers, consolidations, or acquisitions; issuance of capital stock; approval of expenditures or indebtedness involving more than a stated dollar amount; action requiring submission of proposals to the shareholders for approval; appointment or discharge of other director committees; amendment or repeal of a director resolution which by its terms is not amendable or repealable; negotiation of an act of the board of directors; approval of final budgets; and amendment of the certificate of incorporation. Another company's by-laws forbade among other powers any action which the chairman of the board of directors or president had designated as a matter to be considered by the Board. Moreover, several other companies' committees were prohibited from acting in areas reserved to another director committee, such as a finance committee.

The functions performed by "denied power" executive committees ranged from those performed by merely advisory executive committees to those performed by "full power" executive committees. For example, advisory committee actions were performed by several committees of this type-developing corporate policy and recommending it to the board for their action, and ". . . reviewing and considering business matters and making suggestions to the Board of Directors." One company reported that its committee gave managerial advice to the officers of the corporation when the board was not in session, while several "denied power" executive committees acted within their limits and also provided advice to the board concerning "decisions on matters of business policy . . . , studies . . . of problems and possible solutions and . . . recommendations to the Board for final decision."

A few companies, on the other hand, indicated that their "denied power" committee acted in more than an advisory capacity and functioned in practice like a committee delegated only certain duties and powers—a "specific purpose" committee. One such company replied that its committee acted ". . . when an important matter has previously been discussed by the full board which has suggested the Executive Committee dispose of the matter in accordance with the Board's line of thinking." Other companies replied that one function of their committee was to act in emergency circumstances. Finally, there were those companies which indicated that the action taken by their "denied power" committees was similar to the action

taken by "full power" committees. Such action included: review of budgets; approval of purchase or sale of corporate property; acquisition of financing for the purchase of such property; approval of labor agreements, charitable contributions, and contracts which the officers had no authority to make; authorization to affix the corporate seal or to comply with statutory or other formal requirements; and approval of loans or investments. As with "full power" committees, the emphasis here also was on the routine or ordinary business nature of the committee action. This was summed up in the statement that a particular committee

acts upon all matters of corporate business which are of a somewhat routine nature though requiring action by the Board of Directors or Executive Committee. Only the most important matters requiring corporate action are presented to the Board of Directors for approval or authorization.

CONCLUSION

Today between three-fifths and three-fourths of all corporations use executive committees as an aid to their boards of directors¹⁵³—the frequency of committee use increasing with the size of the company.¹⁵⁴ This correspondence is particularly apparent when number of operating divisions is used to measure company size.¹⁵⁵ The survey also indicated a difference in committee use among industries, presumably because there are general differences among industries in company size, complexity, and geographical spread.¹⁵⁶ When classified according to industry, the survey results showed that companies in the financial (including insurance) and transportation industries had higher executive committee incidence than companies of the other industry groups represented.

Presumably because their relative size underlies their usefulness, executive committees are generally smaller bodies than boards of directors.¹⁵⁷ Three-

153. These figures are based on the assumption that the results are representative of the entire corporate economy. The Conference Board Record survey found a 70% use factor, the National Industrial Conference survey a 74% factor, and the author's survey a 65% factor.

154. See Appendix C. This relationship is confirmed by both the Conference Board Record survey which, by using number of employees as the sole measure of size, found that 49% of the companies with 1,000 employees or less had an executive committee while 97% of those with over 25,000 employees had such a committee, and the National Industrial Conference survey which, by using total assets as the size measure, reported that 47% of manufacturing companies in the under ten million dollar asset group employed executive committees while 82% in the \$500 to \$999 million range and 94% in the over one billion dollar group had such committees.

155. See Appendix B.

156. Appendix D shows the use of executive committees by industry.

157. See Appendix E.

fourths of the executive committees surveyed had a membership in the 3 to 6 range, with 5 members being the most common size, because as an odd number it eliminates committee deadlocks and makes for a manageable group. The boards of directors in those companies which did not have an executive committee were, as a group, smaller than boards in companies with executive committees,¹⁵⁸ further reinforcing the theory that the use of executive committees is dependent on the size and work load of the board of directors.¹⁵⁹

A related area is the inside-outside makeup of the committee and the board; that is, the relative number of officers who are committee members or directors. Executive committees evidenced a more inside-oriented composition than did boards of directors, presumably because they run the company more directly and are more concerned with day-to-day operational problems.¹⁶⁰

The most prevalent reason given for the creation and use of an executive committee was the need for someone with authority to determine corporate policy and make routine operating decisions when the board of directors is not in session,¹⁶¹ but this is not the sole criterion for determining

158. See Appendices F and G.

159. Also, executive committees met more frequently than boards of directors. The committee's function of supervising daily corporate business accounts for this difference as well as for the disparity between frequency of director meetings in companies with executive committees and in those without executive committees. Boards in the latter companies met more often than those which used committees—reflecting the committee's function as the day-to-day operator and overseer of the corporation.

160. The executive committee was composed wholly of corporate directors in all but 11 of the 101 surveyed companies having such a committee. Of these 11 companies none were incorporated in the minority of states which do not require all members of the executive committee to be corporate directors. In addition, a majority of executive committees were composed of either all or a majority of inside directors, directors who are also corporate officers, or an equal number of inside and outside directors. In only 2 instances were there no inside directors on the committee and in nearly one-fourth of the committees inside directors constituted the entire membership. The Conference Board Record survey showed that 31% of its reporting companies' executive committees consisted of all inside directors, 20% had a majority of inside directors, 7% an equal number of inside and outside directors, and only 1% no inside directors at all. Furthermore, it found that inside directors constituted all or a majority of the committee in those instances when the committee met at least once a month or its company had relatively few employees.

161. A "need for policy decisions at more frequent intervals," a "need for corporate action between regular Board meetings," a way "to provide facility of operations between board meetings," and "a recognition of the need to provide for decisions concerning the affairs of the corporation during those interim periods when the board is not in session" were typical of the responses in this category. One company, emphasizing this interval problem said, "Because of quarterly meetings of the Board of Directors, it was felt necessary for the Executive Committee to meet during interim periods to assist of-

whether to use a committee. Another reason, emphasized by a somewhat smaller group of replies, was the desire for greater management control over the affairs of the company; in somewhat related responses, several of the surveyed companies indicated that their growth in size and complexity had led to the creation and use of the committee.¹⁶² In addition, other companies cited the need for prompt action on certain matters and the possibility that emergencies would arise when the board could not act.¹⁶³ This need for prompt action was underscored by some respondent companies whose directors were in different cities and unable to meet on short notice when an immediate decision was needed—an executive committee composed of the in-town directors could almost always meet as needed.

Once the decision to use an executive committee has been made, corporate counsel must carefully deal with several problems connected with committee use—its creation, operation, and powers. Since the board of directors is elected by the shareholders to run the corporation and is probably in the best position to judge the corporation's need for an executive committee, it is logical that it should be given the power to create such a committee. However, because the appointment of an executive committee may indirectly alter shareholder representation in corporate decisions, express by-law or charter authorization for committee use seems indicated so that the shareholders may, by voting on the by-law or charter, exercise some power over the decision to create it. This is the position taken by the Model Act and many statutes,¹⁶⁴ and was generally found in the respondent companies.

Other committee creation problems center around the statutory requirements as to the number and kind of members appointed to the committee. Compliance with these requirements are conditions precedent to valid committee action. Aside from appointing the statutory number of

ficers and act on behalf of the Board." Another group of replies indicated that the large volume of day-to-day or routine business which required director action led to the creation of a committee to ease this work load. One such reply stated, "The committee takes care of routine matters which would otherwise require Board action."

162. This relationship is to be expected, for as the corporation increases in size, the work load and membership of its board of directors increase, and as that happens, the board becomes more difficult to convene and a less effective management body. Appendices B and C show this relationship.

163. Reasons given less frequently for committee existence include: the size of the board of directors; the need for flexibility, convenience, or better communications; the fact that state law allowed the formation of such a committee; and the desire to have a body to study operations and make recommendations to the board of directors, or to provide approval for officer decisions.

164. *E.g.*, ABA-ALI MODEL BUS. CORP. ACT § 38 (1966).

members, usually two or three, the resolution creating the committee must require that all committee members be directors. The rationale behind the latter requirement is that the directors, chosen by the shareholders to run their company, must compose any other group which is entrusted with the operation of the corporation. In the majority states whose statutes include such a limitation on member selection, care must be exercised to comply with this requirement. In those states which do not at present have such a statutory requirement, future questions could be avoided by appointing only directors to the executive committee.¹⁶⁵ Those respondents incorporated in the majority rule states which indicated that their committees were not composed solely of directors are inviting attacks on future committee decisions.

The operation of the committee is the responsibility of the directors; as an instrument of the board of directors, an executive committee should be supervised by the board. Although there is no need for such extensive director control over the committee that it cannot perform its functions without the approval of the directors, some form of direct or indirect control to assure that the committee operates in a way the directors and shareholders intended is clearly appropriate.¹⁶⁶ Such committee control, regardless of its form, is underscored by the statutory codification of the common-law principle that although directors can delegate to a committee their powers to act in a given area, they cannot delegate their responsibility in that area.

Even though there are usually no statutory notice requirements, and the respondents' by-law and charter provisions were generally silent on this point, cases impose a common-law requirement of reasonable notice on director or committee meetings and limit the possibilities of dispensing with such notice. In addition, the common-law requirement that for valid committee action a majority constitutes a quorum applies to executive committee meetings when not embodied in an executive committee statute. This requirement and the rule that generally only a majority of that quorum need agree on a course of action for the committee to act prevents a lone dissenter from blocking effective committee action. Another com-

165. If non-member's views are regarded as desirable before the committee acts, inviting officers or non-member directors to committee meetings would accomplish the result without endangering the validity of committee action.

166. This control might take the form of director veto power over committee action, a somewhat drastic form of supervision; informal control through director consultation with committee members; control through delimitation by directors of the areas in which the committee can act; and control through a careful review of committee action by the board of directors serving as a guide rather than a veto power.

mittee expedient is allowing informal meetings through which the committee can act. This is desirable for it allows flexibility; however, the power must be limited to prevent unauthorized committee minorities from making important corporate decisions.¹⁶⁷

There are two types of committee power authorizations in the most commonly used type of executive committee—the “full power of the board of directors” committee. One allows the committee to exercise all the powers of the board of directors except those reserved to the directors in the corporate by-laws or charter. The other allows the committee to exercise all the powers of the board of directors except those which the executive committee statute specifically denies. The former type has the advantage of permitting the shareholders to choose the powers they wish to deny their committee. This affords flexibility by allowing the company to shape its committee’s powers to its special needs. In large companies today, the proxy system may make the power illusory, so that a combination of the two types might well be advisable; such a combination would enable the company to combine committee power flexibility with the protection afforded the shareholders by the denial type statute. With such an authorization, the more important director powers could be denied the committee statutorily and the shareholders could choose from among the remaining director powers those which they wish their committee to be able to exercise.

Regardless of the type of committee power authorization, the courts will be concerned with the meaning of the phrase “full powers of the board of directors.” The majority of the courts have taken the position that this phrase is not all embracing, and they limit “full power” committees to decisions affecting only the ordinary course of the corporation’s business and to the performance of ministerial functions. These limitations protect the interests of the shareholders by preventing the executive committee from radically changing the nature of the corporation or ending its life. The cases which limit the powers of the committee must still be considered by corporate counsel, for although the statutes are in terms of “full powers of the board of directors,” this ordinary business limitation will likely be engrafted upon the statutory language. The surveyed companies indicated that this limitation on committee powers was nearly always recognized at the corporate level—it was self-imposed if not expressed in the corporate by-laws or the resolution creating the committee.

The executive committee has made a place for itself in modern corporate

167. The statutes attempt this by allowing such action only if all or a majority of the committee members agree in writing beforehand to this procedure. See notes 64-68 *supra*.

practice because it is a useful management tool in large, complex corporations; there, its use allows the board of directors to concentrate its attention on formulation of long range policies, overall supervision, and unusually important corporate decisions by relieving the directors of the planning, execution, and supervision of routine corporate matters. However, since an executive committee can, in large part, take the management of its corporation from the board of directors, safeguards are needed to prevent possible usurpation of power. Prior to the advent of statutory authorization and regulation of these committees, the courts had coped with this problem either by not permitting their use or by restricting the range of their power and activities. When the growing use of executive committees led to statutory approval of their use, the need for regulation was met in most legislative plans by giving the shareholders the power to permit the use of a committee, limiting committee membership to directors, and either expressly denying the committee the power to act in certain areas or allowing the shareholders to do so. The present scheme allowing a corporation to make use of executive committees while attempting to prevent abuses of power by these groups seems to be a logical middle road between denying corporate management the use of this helpful tool and permitting a minority of the board to pre-empt all of the corporation's power through membership on an executive committee.

APPENDIX

APPENDIX A Questionnaire

I. General

1. Corporate name
2. Address of general offices
3. Nature of business or principal product
4. State and date of incorporation
5. Size:
 - a. Number of employees
 - b. Number of operating divisions or departments
6. Does the corporation presently have an executive committee or committees?
7. If so, for how many years has it existed?
8. If not, has it ever had any?
9. Does it have any other committees appointed by the board of directors?

II. Board of Directors

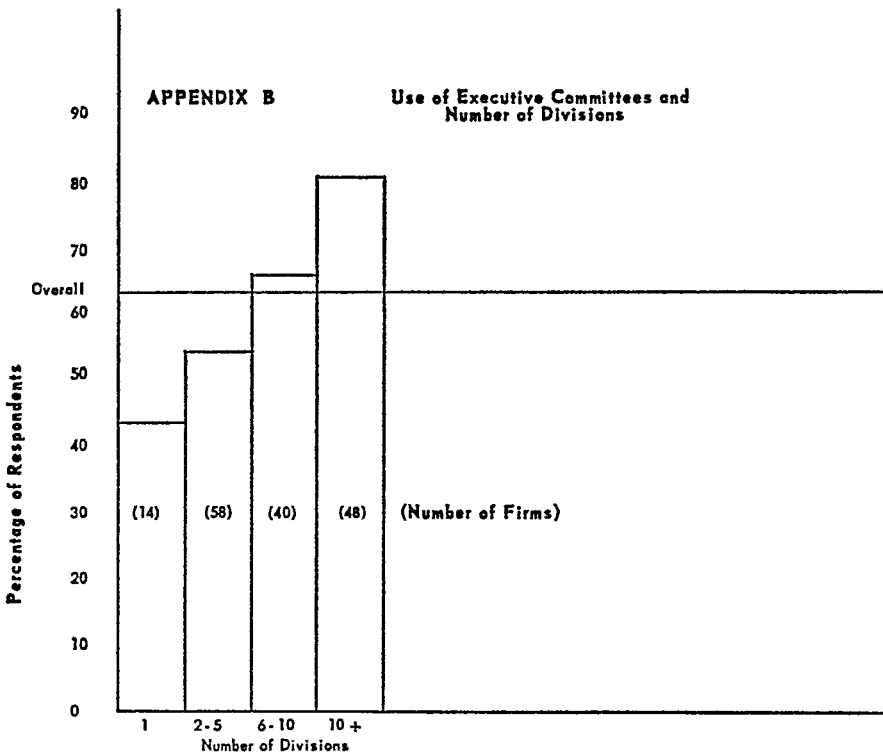
1. Composition:
 - a. Number of directors
 - b. Number of directors who are officers
2. Meetings:
 - a. Frequency: Weekly; Bi-Monthly; Monthly; Quarterly; Other (Specify)
 - b. Quorum requirements: Majority; Other (Specify)
 - c. Quorum requirements fixed by: Statute; Articles of incorporation; By-Laws
 - d. Number required to act for the board once a quorum exists: Majority; Other (Specify)
 - e. What are the notice requirements for regular meetings?
 - f. Notice requirements fixed by: Statute; Articles of incorporation; By-laws
3. Relation of the board of directors to the executive committee:
 - a. Is it possible to isolate the factors which led to the creation of the committee? If so, what are they?
 - b. What powers were expressly delegated to the executive committee by the board of directors?
 - c. What powers, if any, were expressly denied to the committee by the board?
 - d. Control of the board over the committee:
 - Does the board have a veto power over the actions of the committee?
 - Does the board suggest areas in which the committee should act?
 - Is the board's approval required to put the committee's action into effect?
 - Does the board review the work of the committee?
 - Is there informal control of the committee through consultation between the board and the committee before the latter acts?

III. The Executive Committee

1. Composition:
 - a. Number of members
 - b. Number who are also officers of the corporation
 - c. Number who are also directors of the corporation
 - d. Position of the chairman in the corporation
2. Meetings:
 - a. Frequency: Bi-weekly; Weekly; Monthly; Other (Specify)
 - b. Quorum requirements: Majority; Other (Specify)
 - c. Quorum requirements fixed by: Statute; Articles of incorporation; By-laws; Board of directors resolution
 - d. Number required to act for the committee once a quorum exists: Majority; Other (Specify)
 - e. Does the committee have authority to meet at a place other than the general offices of the corporation? Has it ever done so?
 - f. What are the notice requirements for regular meetings of the committee?
 - g. Are directors and officers who are not committee members invited to attend committee meetings? If so, have they done so often; occasionally; never
 - h. Are committee members elected by the board of directors?
 - i. Are committee members replaced by: the board of directors; the committee

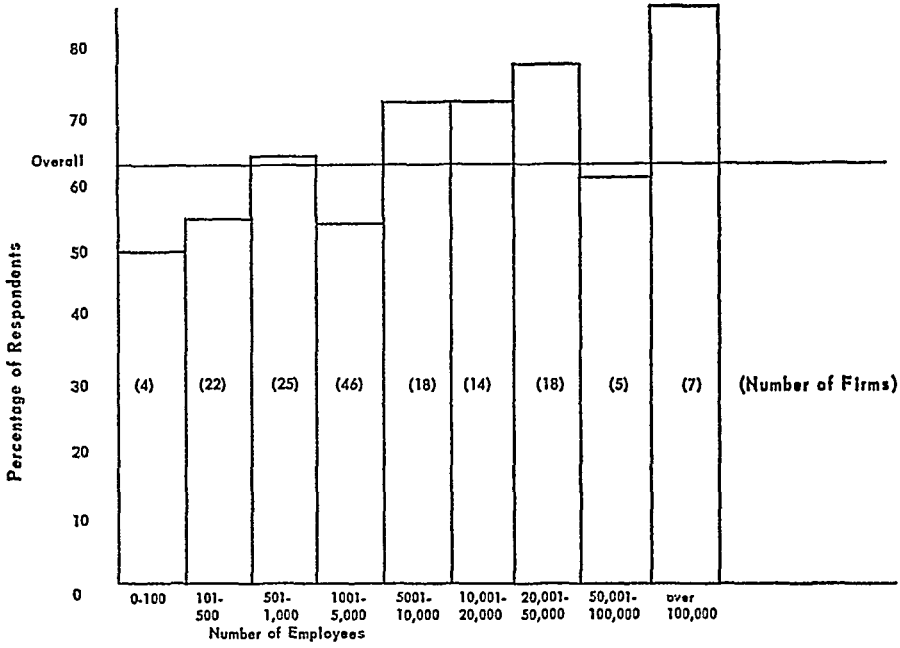
3. Authority of the committee:

- a. Is an executive committee specifically authorized by: Articles of Incorporation; By-laws
- b. Was the committee created: for specific purposes (Specify); to act in an advisory capacity to the board of directors; to run the corporation while the board was not in session; other (Specify)
- c. Please enumerate and describe the activities the executive committee performs.



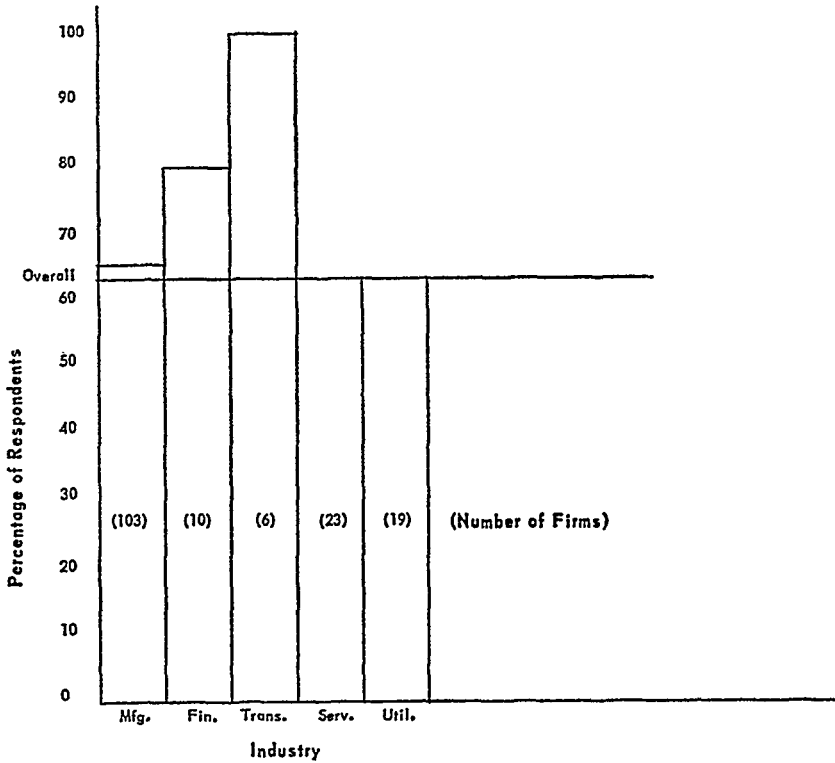
APPENDIX C

**Use of Executive Committees and
Number of Employees**



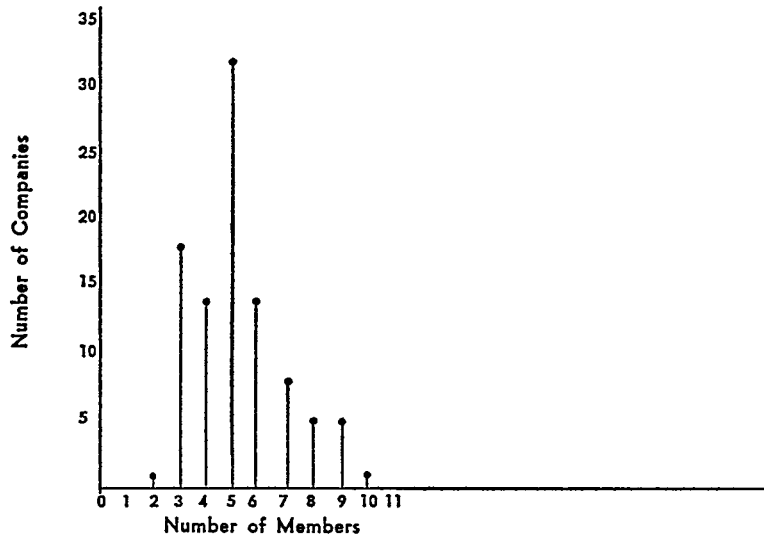
APPENDIX D

**Use of Executive Committees and
Industry Classification**



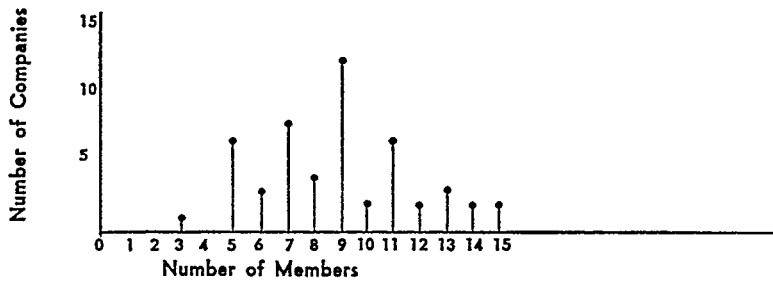
APPENDIX E

Executive Committee Size



APPENDIX F

**Board of Directors Size
(No executive committee)**



APPENDIX G

**Board of Directors Size
(With executive committee)**

