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May 02, 2023

What Are “Additional Soliciting Materials” for the Proxy Season?



During the proxy season, if you solicit votes for your annual meeting — other than delivering your proxy — you must file that communication with the SEC as "additional soliciting material" no later than the date of first use.

"Additional soliciting material." Definitely one of the strangest terms of art in our field. Today, they are probably more commonly known as "proxy supplements" or "supplemental materials." I say "additional soliciting materials" because that's the term that was commonly used when I got trained back in my SEC days, over 30 years ago.

Let's go over the legal requirements first:

1. Rule 14a-6(b) requires the filing of "other soliciting materials" with the SEC no later than the date they are first given to shareholders.
2. Rule 14a-1(l) defines "solicitation" quite broadly –
 - (i) Any request for a proxy whether or not accompanied by or included in a form of proxy;
 - (ii) Any request to execute or not to execute, or to revoke, a proxy; or
 - (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

There are some exclusions from that definition. One important one is "The performance by any person of ministerial acts on behalf of a person soliciting a proxy."

Another exclusion is a shareholder announcing how they intend to vote — assuming they're not waging a proxy contest — provided it's done in a way that meets the three definitions in the rule. So if you're using a

communication to solicit votes in some way — and it's not ministerial, which is quite a low bar for a communication not being a solicitation — it must be filed with the SEC.

Another factor that should be considered is that most practitioners tend to not file communications that have the proxy statement filed with the SEC as a root source. In other words, you've already filed the proxy statement with the SEC and you have a communication that merely repeats what portions of the proxy statement says. You're essentially saying the same thing that has already been filed — and general practice is to not go and refile every single time you use the same statement or explanation that you already have on file with the SEC.

Sometimes you'll be delivering additional soliciting material before you file your proxy statement. A good example of that is when you file your "Notice of Internet Availability of Proxy Materials." You're delivering that to shareholders before you deliver your proxy, and typically filing both items on the same date (with the definitive proxy statement filed just before the additional soliciting material). Oddly, it's still filed and called "additional soliciting materials" even though it would be more accurately called something other than "additional" since it's a precursor in delivery terms.

Note that if you're using communications about the annual meeting before your final definitive proxy is filed, the bar might be lower in terms of what you should consider soliciting material. You might want to err more on the side of caution and file those communications with the SEC. Filing additional soliciting material isn't that much of a burden so that makes it easy to play it safe.

The SEC's rules don't distinguish between oral and written communications. It's not uncommon for scripts to be filed with the SEC. Some companies really need to bring in the vote and they hire proxy solicitors who help the effort with a phone campaign. These campaigns involve the callers reading from a script that has been filed with the SEC.

All kinds of things get filed as additional soliciting materials. Some are pretty interesting and even unique. And remember that when you file additional soliciting material with the SEC, you will need to check a box on the cover of the Schedule 14A to indicate that's what it is...

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