

## What Corp Fin's Two New Interpretations on Exempt Solicitations Tell Us

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At the end of July, the SEC Division of Corporation Finance issued two interpretations (known as CDIs) on notices of exempt solicitations. These are the filings that may suddenly show up on a company's Edgar page, confusingly called "PX14A6G." For example, after filing its proxy statement in April, [Facebook received](#) four such notices from different investors. Three urged the company's shareholders to support their shareholder proposals while one asked shareholders to withhold on the election of the company's CEO to the board.

Notices of exempt solicitations have been around for some time, but during this season, the notices submitted by retail investors begin to attract attention. These were a little less focused in terms of the purpose, and somewhat more inflammatory in terms of language. Questions were raised to the SEC staff about the need to clarify the requirements for using these types of filings, in particular the requirement under Rule 14a-6(g)(1) that the shareholder using an exempt solicitation own more than \$5 million of shares. The staff responded with new Q&As, 126.06 and 126.07, [here](#).

The SEC staff explains in the new interpretations that it will "not object" if a soliciting party that is not subject to Rule 14a-6(g)(1), including failing to own the requisite amount of securities, makes a "voluntary submission" of an exempt solicitation. The filing must include a cover of Notice of Exempt Solicitation, which has to clearly state that the notice is being provided on a voluntary basis. While this "voluntary" designation is intended to inform investors that the person or entity making the filing does not own more than \$5 million of securities, it's highly unlikely that the vast majority of investors are even aware of the current rules, nor would they ever equate a "voluntary submission" to the failure to meet the ownership requirement.

For all notices of exempt solicitations, certain information pursuant to Rule 14a-103 must be presented before any written solicitation (including logos or graphics) may appear, including the name of the company and the name of the person relying on the exemption.

The upshot is that companies are unlikely to find that the new CDIs satisfactorily address concerns that their SEC Edgar site has been hijacked, and the types of notices we saw this season are likely to continue and possibly proliferate given the fairly simple guidelines.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**Ning Chiu**

+1 212 450 4908

ning.chiu@davispolk.com

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