

MINDING YOUR P'S AND X'S

An obscure SEC form is being used to communicate directly with shareholders through the SEC's EDGAR system.

BY ANITA SAMA

Here in 2019, it would be hard to be truly surprised by an online posting. Social media has spawned a free market for unfettered conversation. Yet somehow, a few forums have remained almost entirely off-limits to unfiltered contributions. The SEC's EDGAR filing system was one such – or so many IR professionals thought.

Then the Form PX14A6G (Notice of Exempt Solicitation) was discovered – or rediscovered.

Until recently, these forms were used sporadically by institutional investors to provide notice via EDGAR that they had filed a shareholder proposal and were asking other investors to support their resolutions. Under SEC rules, a filing shareholder, who owns \$5 million or more in shares, must mail a solicitation for a proxy proposal to fellow shareholders, and also file a Form PX14A6G. In other words, the SEC determined that any investor mailing out to other investors should also give them a heads-up via the SEC's EDGAR system, designed to collect, index and forward filings by companies and others.

Ken Bertsch, now executive director of the Council of Institutional Investors, is the former director of the governance engagement program at TIAA-CREF. He said, "We had to file these [PX filings]. Our counsel told us we had to . . . when we filed shareholder proposals."

However, the SEC also carved out an exception for shareholders with less than the requisite \$5 million stake, exempting them from the ownership threshold and mailing requirement as long as the filing was made on a strictly voluntary basis.

Bertsch said his experience with the PX14A6G forms led him to think of them as a simple accompanying procedure, capturing little attention, though "I have to say that when I was doing these, I often wondered why more people didn't do this."

"The proxy rules were reformed so that investors could talk to each other without the burden of having to file anything," according to Edward Rock, Martin Lipton Professor of Law and director of the Institute for Corporate Governance and Finance at New York University. Rock explains that the SEC's sub-\$5 million limit was meant to provide a safe harbor for small investors but created a gray area – perhaps unwittingly.

While the SEC may have created the form to ensure that institutional investors and other large holders provide notice to other investors, Rock said, others have figured out how to use this form to insert themselves into a shareholder conversation.

"In an age in which it doesn't cost anything to communicate, how has no one seen the opportunity to create the Hyde Park Corner of the shareholder universe?" Rock asked rhetorically.

“Maybe this is that. A shareholder can file one of these and everyone really does see it, apparently.”

By the Book

On the heels of the Parkland, FL, school shooting, U.S. gun manufacturers received shareholder proposals demanding corporate accountability on how their products are used in violent crimes. They were sponsored by an interfaith group led by Catholic nuns, who met the SEC’s minimum one-year/\$2,000 threshold allowing them to submit a shareholder proposal. The nuns drew the attention of larger investors and gained some support.

However, the gun manufacturers also received PX filings from at least one organization that did not identify itself as a shareholder in its filings. On its website, Majority Action calls itself “a community of everyday people who believe that shareholders play a critical role in holding corporations accountable to high standards of corporate governance and social responsibility.”

Coming out of the Shadows

Now the EDGAR stage of shareholder communication is changing. Instead of activist shareholder proposals accompanied by the PX Form, the form itself is playing alone.

To add some historical context, the rules governing proxy voting hark back to the major securities laws passed in the wake of the Great Depression, when there was concern that there was insufficient regulation of offers to sell securities, and the ongoing requirements of those companies to report publicly. But under those rules, there was a growing view in subsequent decades that restrictions, including SEC registration, obtaining legal counsel, cost of mailing, etc., could stymie communication.

So back in the 1980s and ‘90s, the SEC provided some flexibility for companies and shareholders to communicate better. In 1992, the SEC adopted new proxy rules, including an exception to the \$5 million threshold for disclosing shareholder communications.

If you own \$5 million in shares, you must file the form PX for specific communications, but if you don’t, you apparently can file voluntarily.

The rule was not precisely defined. While nothing seemed to bar a filer who doesn’t own \$5 million of company stock from using a Form PX, it had been far from certain whether the SEC actually sanctioned these filings, though sanction seems to have been assumed by those who have filed.

That is until July 31, 2018, when the SEC finally offered some guidance, quite possibly in response to the lack of clarity and questions from companies on the subject.

Shedding Some Light

In new Compliance and Disclosure Interpretations (C&DIs), the SEC staff noted: “Although the requirements of Rule 14a-6(g)(1), including the submission of a Notice of Exempt Solicitation, only apply to a soliciting party who beneficially owns more than \$5 million of the class of subject securities, the staff will not object to a voluntary submission of such a notice, provided that the written soliciting material is submitted under the cover of Notice of Exempt Solicitation as described in C&DI 126.07 and such cover notice clearly states that the notice is being provided on a voluntary basis. Doing so will make it clear to investors the nature of the submission and that it is being made on behalf of a soliciting party who does not beneficially own more than \$5 million of the class of subject securities.”

Since January of this year, a few serial, voluntary filers have emerged, one especially from a source familiar to many IR professionals.

The PX14A6G Poster Boy

Prolific proxy proposal activist John Chevedden is just one who has recently recognized the shades of gray in this once obscure form, and he has begun to wield it repeatedly. Data from FactSet Research shows that, prior to 2018, Chevedden had not filed any Form PX14A6G, but since March, he has filed 23. (By comparison, CalPERS, the huge California public employees’ retirement system, has filed just 17 and that group also appears to have concurrently mailed solicitations as the form was traditionally used.)

When Chevedden was contacted for this story, he referred questions to Sanford Lewis, an Amherst, Mass.-based attorney whose practice exclusively involves shareholder rights.

Chevedden isn’t a client of Lewis, but he is a member of the Shareholders Rights Group, which Lewis organized in 2016. Lewis said he has been involved in filings under the rule, not helping Chevedden, but assisting others file the Form PX.

Lewis said he believes Chevedden started to make use of the form as a means of pushing back against “so-called, status quo proposals where basically, he proposes a change, and then the company proposes leaving things as they are . . . so the proposal to change is mooted out by the proposal to keep things as they are. This is his way of responding to that situation.”

Lewis said the SEC has contacted Chevedden this proposal

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season and “has informed John to be aware that one has to be concerned about violating the securities laws when you file one. In particular, you don’t want to put misleading statements in it or there could be legal liability.”

Lewis said the SEC has “been under pressure from investor relations departments to rein in how John files them and, on an informal basis, they’ve told him he needs to do them in a more rigorous format in terms of how he lists things and making sure that everything’s clear.”

“I don’t think they asked him to do anything unreasonable. I think he will be able to comply,” Lewis said.

“It will have a beneficial effect for these notices because his will be more clearly labelled and that’s good.”

Lewis said he doesn’t “think there’s a genuine major problem with these filings, but of course the fact that it’s easy enough for John to do that – just like it’s possible for him to file shareholder proposals at numerous companies – is why the companies are saying, ‘Oh, now he can put something into the file at the SEC that appears in our company file.’ I’m sure that they would rather he would not be empowered in that way.”

Observers admit that Chevedden has figured out that he can use the Form PX to get on a company’s EDGAR page, where most people who track a company’s stock will see it, publicizing his viewpoint, without the cost of newspaper ads or acquiring a shareholder list.

But the word “nuisance” comes up again and again in corporate circles, as some companies and their lawyers characterize these filings as deflecting time, energy, and focus away from more important concerns, sometimes incurring unnecessary legal expense.

The PX Effect?

The question becomes, “Are these filings having impact?”

Shareholder lawyer Lewis said he’s not aware of any studies of PX filing impact, but one possible effect could be “quite unusually low shareholder support” for company efforts to ratify status quo

proposals. Filing an exempt solicitation may alert tracking analysts and others to company actions that might go unnoticed. He said, “I wouldn’t be surprised if this becomes a continuing concern for some companies.”

“It’s hard to know,” admits Ronald Mueller, partner at Gibson Dunn, a law firm that represents companies in corporate governance matters. “Are they perhaps swaying the retail shareholder? It’s hard to know if the retail investor is actually looking at these things.” Though a familiar tool for anyone who follows a company ticker, EDGAR still has a limited audience.

While the true impact of these less-formal, shareholder-to-shareholder memos is still uncertain since most proxies are cast by major players, like index funds, what seems to be assured is that this avenue is likely to see more traffic in 2019.

Gibson Dunn’s Mueller points out that the mechanics of filing a Form PX14A6G are relatively straightforward for anyone who has something to say: “The long and short of it is that there is not much the person has to do. The person is supposed to be a shareholder, but it’s not like it’s really being policed.” And there are other issues raising concerns.

In a March 2018 blog post, Mueller wrote that the filings may “misleadingly suggest that the filing person is a significant shareholder” and the notices can be confusing to shareholders and other stakeholders since they are not required to state their interest in the matter.

“Finally, it is unclear what practical and timely recourse a company would have for materially false and misleading statements that are included in Notices,” he wrote.

He said, “EDGAR is such an effective means of communication. That’s what this shows.”

The SEC has signaled that a review of the proxy process, which may involve a revision of the role of the PX form, may well be in the works. The Commission hosted a roundtable in November 2018, “to hear investor, issuer, and other market participant views about the proxy process and rules,” but rule changes are a laborious process and are unlikely to occur very soon. [IR](http://niri.org)