

Shareholder Meetings and Proxy Solicitations in the Age of Social Media

Let's assume you're the social media manager for a publicly traded company and you're responsible for monitoring and updating the content on all of your company's various social networking channels.

Let's say it's the morning of June 2, 2011, and yesterday afternoon the company announced that its annual shareholder meeting would take place on August 15, 2011. The meeting will include the company's first non-binding shareholder advisory vote on executive compensation (a say-on-pay vote).

You've just settled into your desk and started to go through your morning routine, when an email alert pops up in the corner of your monitor. Someone has posted a new comment on the company's investor relations Facebook page. You click through and find that a shareholder has left a detailed comment on how he intends to vote against the company's say-on-pay proposal including a host of reasons why. He's just posted it and it's already gotten three "Likes"!

What do you do? How do you respond; should you? Before you do anything, you need to understand how the federal proxy rules work and how they might apply in the world of social media.

When it comes to shareholder meetings, companies have to be concerned with two bodies of law

Public companies organized in the United States operate under a dual system of laws—state corporation laws and federal securities laws—which often intertwine and sometimes overlap.

State corporation laws are predominantly concerned with a company's structure and the relative rights and responsibilities of its shareholders, directors and management. In contrast, federal securities laws are predominantly concerned with transparency and the adequacy of a company's information disclosures.

In the context of a shareholder meeting, state corporation laws govern matters such as who is entitled to vote and the quorum requirements—the minimum number of shares that must be present, in person or by proxy, for the meeting to take place. Whereas federal securities laws govern matters such as the type of information required to be disclosed and in what timeframe.*

At its most basic level a proxy relationship is a legal relationship, governed by state law, in which one person grants authority to another to act on their behalf, such as when a shareholder grants a company's executive officers the authority to vote on their behalf at an annual meeting.

The federal proxy rules

The federal proxy rules overlay the state laws governing proxy relationships and are designed to replicate, as closely as possible, the voting experience that a shareholder granting proxy authority would have if they had otherwise attended the meeting in person. The rules seek to accomplish this by promoting fair corporate suffrage and ensuring full and fair disclosure in all solicitations for proxy authority. To that end, the federal proxy rules require that whenever anyone—whether a company, its

* In addition to state corporation laws and federal securities laws, if a company's securities are listed on a national securities exchange, such as the NYSE or Nasdaq, it must also adhere to the exchange's listing requirements, the details of which we won't be getting into here.

officers, directors, shareholders or a third-party proponent—solicits proxy authority they must either furnish a proxy statement with that solicitation or meet certain other disclosure and filing requirements.

While not every communication with a shareholder qualifies as a “solicitation”, the Securities and Exchange Commission does define the term broadly to include any communication—whether in the form of a widely distributed announcement or a private email message—that is reasonably calculated to result in the procurement, withholding or revocation of a proxy; making the disclosure and filing requirements of the proxy rules potentially applicable to anyone seeking to influence a shareholder vote.

If a communication qualifies as a solicitation and it is in writing then it must be filed with the Commission on the same day as it is first published, sent or given to a shareholder. Written communications encompass all forms of information not otherwise disseminated orally and will generally include things like blog posts, tweets, slide presentations and even videos (which must be transcribed when filed).

Exemptions from the federal proxy rules

There are a number of exemptions from the disclosure and filing requirements of the federal proxy rules. For example, there is a carve-out from the definition of solicitation for communications that simply state how a shareholder intends to vote and the reasons therefor (such as in our hypothetical above); however, once a shareholder makes use of this exemption they cannot subsequently engage in a solicitation for proxy authority with respect to the same meeting.

There is another exemption that allows certain persons to engage in communications that qualify as solicitations provided they are not seeking proxy authority and do not have a substantial interest in the subject matter of the solicitation. This exemption is meant to encourage public debate by eliminating concerns that participants might have regarding the possibility of complying with or potentially violating the proxy rules. It is not available for a company or certain other categories of persons, but is available for a company’s officers and directors provided the solicitation is not company-financed. As with the previous exemption, once a person makes a solicitation in reliance on this exemption, they cannot subsequently engage in a solicitation for proxy authority with respect to the same meeting.

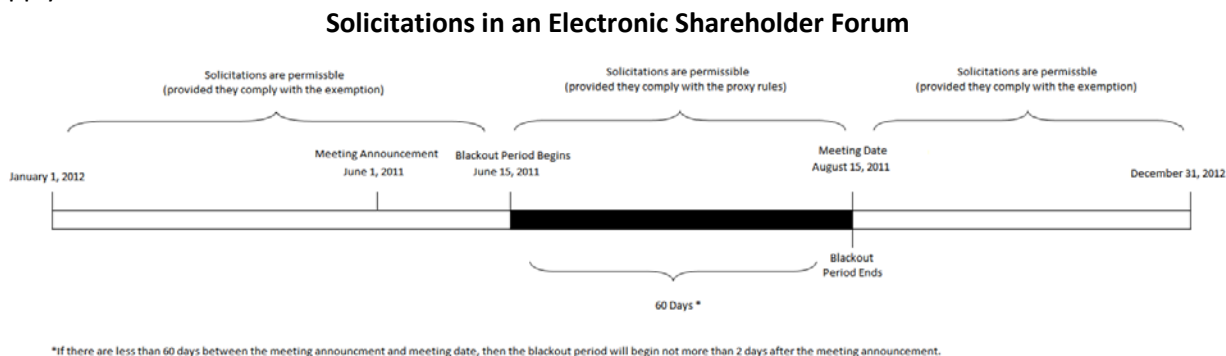
There is also the electronic shareholder forum exemption, which the Commission adopted in 2008 as part of a series of proxy reforms designed to facilitate “experimentation, innovation and greater use of the Internet”. This exemption allows a person to engage in communications that qualify as a solicitation in an electronic shareholder forum established, maintained or operated by a company, a shareholder or a third party acting on behalf of a company or a shareholder, provided:

- they do not seek proxy authority or furnish or otherwise request a form of revocation, abstention, consent or authorization; and
- the solicitation is made more than 60 days before the date of a shareholder meeting (or if a meeting is announced less than 60 days in advance, not more than 2 days after the announcement).

Whoever establishes, maintains or operates an electronic shareholder forum is not liable for any of the statements made or information provided by other forum participants.

In contrast to the previous exemptions, the electronic shareholder forum exemption is available anyone, including a company, and once a person makes a solicitation in reliance on this exemption they can subsequently engage in a solicitation for proxy authority, provided they comply with all of the disclosure and filing requirements of the federal proxy rules. However, as the Commission noted in its [adopting release](#), when a person relies on the electronic shareholder forum exemption and then subsequently solicits proxy authority, they have to consider whether their earlier communications, if still accessible to shareholders, should be filed as soliciting materials.

Using the timeline from our hypothetical above, the electronic shareholder forum exemption would apply as follows:



It is also important to note that while company communications made in reliance on the electronic shareholder forum exemption are exempt from the disclosure and filing requirements of the federal proxy rules, they still have to comply with the requirements of [Regulation FD](#) and the antifraud provisions of the federal securities laws.

So let's go back to our hypothetical

The shareholder comment definitely falls within the carve-out from the definition of solicitation, so it's not subject to the disclosure and filing requirements of the proxy rules.

But if you reply, would your response also be exempt? Arguably the electronic shareholder forum exemption would apply. I say arguably because the Commission has never defined what an electronic shareholder forum is, nor has it placed any structural or technological limitations on what it can be. So, while there's no intrinsic reason as to why your investor relations Facebook page, if properly set up, would not qualify as an electronic shareholder forum, it's still an untested idea.

Something else to consider is that most companies solicit proxies; they have to in order to ensure that there are enough shares present to satisfy the quorum requirement under state corporation law. If your company is already in the process of soliciting proxies then your response could be deemed to be solicitation on behalf of the company. In that case, the electronic shareholder forum exemption wouldn't apply; the company would have to file your response with the Commission that same day and may even have to disclose you in the company's proxy statement as a participant in the solicitation.

The best way to handle a situation like this is to really plan for it in advance. But if your company doesn't have a strategy in place and you're not a part of the proxy team, then resist the urge to respond, even if the comment receives a hundred "Likes" and seek out the advice of company counsel or someone involved in the proxy process. It might also be a good time to bring up that contingency plan ...

Much thanks to Dominic for some excellent feedback and help in formulating the hypothetical for this post.