

PUBLICATION

Permitted (Mis)-Use of the SEC's EDGAR Disclosure Platform

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Two new compliance and disclosure interpretations (C&DIs) issued by the SEC permit the voluntary filing of solicitation materials in a Notice of Exempt Solicitation. This stockholder activist tactic, which was used during the 2018 proxy season, will likely reappear in the 2019 proxy season as a way for stockholders to express their views without soliciting proxies.

Exchange Act Rule 14a-6(g) requires that a stockholder who engages in an exempt solicitation and owns more than \$5 million of securities in the company file a Notice of Exempt Solicitation with the SEC, which then appears on the company's EDGAR filing page. These notices may include statements encouraging other stockholders to vote in a particular way, such as against company directors. The SEC has made clear that a Notice of Exempt Solicitation may be filed voluntarily (i.e., by a stockholder **not** meeting the \$5 million threshold), but the notice must state that it is being filed voluntarily and provide the name and address of the person submitting the notice. Because stockholder activists will likely be emboldened to voluntarily file these notices following the new SEC guidance, public companies should be aware of this stockholder activist tactic in the upcoming 2019 proxy season.

To discuss whether and how to respond to such tactic outside of the standard shareholder proposal process under the SEC's proxy rules, please contact [Sam Chafetz](#) or any member of Baker Donelson's [Corporate Finance and Securities Group](#).