

A Review of Notice of Exempt Solicitation Filings

October 28, 2022

ESG-focused activists are increasingly using exempt solicitation filings to get their message out, and in recent years have increasingly shifted their focus toward environmental and social issues (E&S) while also escalating the pressure on subject companies.

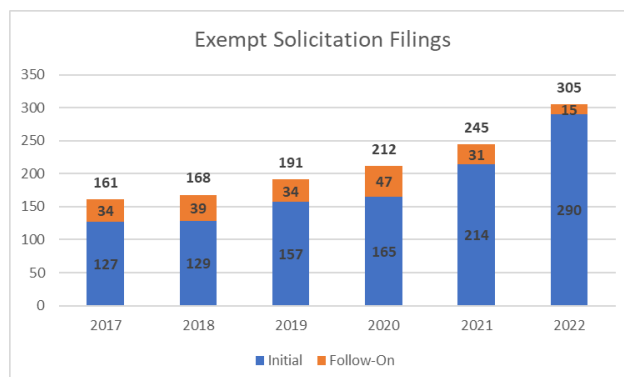
What is an Exempt Solicitation?

ESG activists have long been associated with the 14a-8 shareholder proposal process as the primary means by which they forward their objectives. Because these activists rarely file Schedule 13Ds or wage full-fledged proxy fights, an important avenue to also gauge ESG activist priorities are Notice of Exempt Solicitation filings. A Notice of Exempt Solicitation is an SEC filing that is used by shareholders to express their views and to lobby fellow shareholders on specific issues that are subject to an upcoming vote. These filings are most commonly used by proponents to make their case to support their proxy proposal beyond the 500-word limit imposed by Rule 14a-8. To a lesser extent, these filings are also used to urge a vote for/against a management proposal (e.g., vote against the company's "say on pay" proposal) or against the re-election of company directors to signal displeasure with a company's actions or policies. These communications are exempt from certain SEC proxy rules if the shareholder is not seeking the power to act as proxy for a security holder. A Notice of Exempt Solicitation is required to be filed with the SEC within a prescribed period if the shareholder conducting the exempt solicitation owns more than \$5 million of company stock. However, the SEC allows these filings to be made voluntarily by holders of less than \$5 million, and most exempt solicitations (76% in 2022) are now made on a voluntary basis. A Notice of Exempt Solicitation will appear on the SEC's EDGAR filing system alongside the company's other documents as a "PX14A6G" filing.

Note: Exempt solicitations filed since 1/1/2017. Excludes a small number of filings against closed-end funds and duplicate filings (i.e., the activist refiled the same day to correct an error). Exempt solicitations may have more than one objective (e.g., Support Shareholder Proposal and Vote Against Director) and more than one filer.

A Record Year – Overall Filings and Distinct “Campaigns”

Activists often file an initial exempt solicitation (an “initial” filing), then press their case by making additional filings regarding the issue identified (a “follow-on” filing). 2022 has been a record year, both for total exempt solicitation filings as well as initial filings. The 305 total filings in just the first three quarters alone is already more than has been filed in any previous full year. The 290 initial filings in the same time period already exceed 2021’s full-year (and previous record) 214 filings – a 36% increase. In just the past decade, the volume of total exempt solicitation filings has skyrocketed over 320% from the 72 total exempt solicitation filings made in 2012.



Vote Objectives

Exempt solicitations have historically been, and continue to be, primarily used in support of shareholder proposals. Four-fifths of exempt solicitation filings in 2022 were solely in support of a proposal or among the objectives cited by the activist (a filing can include more than one vote objective). While that proportion is consistent with past years, what's changed is the sheer number of filings. In 2017, a total of 131 exempt solicitation filings were related to shareholder proposal support, with that number jumping 90% to 250 in the first three quarters of 2022. Proponents and their allies are increasingly not relying on the supporting statement in corporate proxies to rally support for their proposals. In 2017, 21% of the 14a-8 shareholder proposals that appeared in corporate proxy statements at U.S. reporting companies included one or more exempt solicitation filings in support. So far in 2022, that rate has nearly doubled to 41%.

Calls for, or suggestions to, fellow shareholders to vote against the re-election of directors is the second most frequent vote objective cited in filings. These calls have also seen a considerable increase in frequency, with 2022 already doubling full year 2017's volume. In addition to the increased volume, a significant shift in the reasons cited by activists to vote against directors has emerged. Over 75% of the calls to vote against directors in 2017 cited governance concerns, primarily over executive compensation issues, with E&S issues cited in only 15% of the filings. Through September 30, 2022, almost 72% of exempt solicitations calling for or suggesting votes against directors included E&S issues among the reasons. Majority Action, a nonprofit shareholder advocacy organization, has been the most frequent filer of such demands.

Exempt Solicitations	Exempt Solicitations													
	2017		2018		2019		2020		2021		9/30/2022		Total	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
	(161)	(100)	(168)	(100)	(191)	(100)	(212)	(100)	(245)	(100)	(305)	(100)	(1,282)	(100)
Vote Objective														
Support Shareholder Proposal	131	81.4	114	67.9	156	81.7	151	71.2	195	79.6	250	82.0	997	77.8
Vote Against Director	26	16.1	32	19.0	28	14.7	51	24.1	49	20.0	53	17.4	239	18.6
Vote Against "Say on Pay"	15	9.3	3	1.8	12	6.3	26	12.3	13	5.3	6	2.0	75	5.9
Vote Against Management Proposal	1	0.6	12	7.1	2	1.0	16	7.5	1	0.4	7	2.3	39	3.0
Vote Against a Merger	8	5.0	13	7.7	12	6.3	2	0.9	4	1.6	4	1.3	43	3.4
Vote for Management Proposal	1	0.6	5	3.0	16	8.4	1	0.5	6	2.4	9	3.0	38	3.0
Vote for Dissident Nominee	0	0.0	0	0.0	1	0.5	0	0.0	4	1.6	0	0.0	5	0.4
Other Issues	0	0.0	3	1.8	1	0.5	5	2.4	0	0.0	1	0.3	10	0.8
Vote Against Director														
Citing an Environmental or Social Reason	4	15.4	7	21.9	5	17.9	15	29.4	34	69.4	38	71.7	103	43.1

Theme and Activist Filers

Not surprisingly, exempt solicitation filings also reflect the heightened focus on the "E" and "S" of ESG in recent years. E&S themes in exempt solicitation filings have more than tripled in the last five years, from 76 filings in 2017 to 243 filings in 2022. One of the main drivers of this change is the type of shareholder making the filing. Labor union and public pension funds have been consistent filers of exempt solicitations for many years. While these funds do cite E&S issues, they have consistently (and more commonly) raised classic corporate governance concerns like shareholder rights, executive compensation and board leadership and structure. However, advocacy groups (e.g., As You Sow), religious groups and ESG-focused asset managers, who overwhelmingly focus on E&S matters, have dramatically increased their filing volume over the last five years – from 62 collective exempt solicitation filings in 2017 to 212 collective filings already through the first three quarters of 2022.

Value creation themes make an occasional appearance in exempt solicitation filings. While economic activists have increasingly used ESG issues in their campaigns in recent years, exempt solicitations continue to be a rarely used method for these activists to communicate to investors (i.e., only 5% of filings have a value creation theme in 2022).



Exempt Solicitations	Exempt Solicitations													
	2017		2018		2019		2020		2021		9/30/2022		Total	
	# (161)	% (100)	# (168)	% (100)	# (191)	% (100)	# (212)	% (100)	# (245)	% (100)	# (305)	% (100)	# (1,282)	% (100)
Theme														
Environmental	42	26.1	28	16.7	24	12.6	18	8.5	56	22.9	91	29.8	259	20.2
Environmental/Governance	0	0.0	0	0.0	2	1.0	4	1.9	1	0.4	4	1.3	11	0.9
Environmental/Social	2	1.2	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	0.2
Governance	66	41.0	73	43.5	81	42.4	92	43.4	81	33.1	49	16.1	442	34.5
Other Issues	0	0.0	0	0.0	2	1.0	1	0.5	0	0.0	0	0.0	3	0.2
Social	30	18.6	39	23.2	45	23.6	57	26.9	94	38.4	139	45.6	404	31.5
Social/Governance	2	1.2	6	3.6	3	1.6	6	2.8	10	4.1	7	2.3	34	2.7
Value Creation	19	11.8	22	13.1	34	17.8	34	16.0	3	1.2	15	4.9	127	9.9
Vote Against Director														
Citing an Environmental or Social Reason	4	15.4	7	21.9	5	17.9	15	29.4	34	69.4	38	71.7	103	43.1

While groups such as labor unions, public pension funds, advocacy groups and religious groups make up the bulk of the filings, individuals have accounted for 1 in 10 exempt solicitation filings so far in 2022. John Chevedden, a well-known governance activist and prolific sponsor of shareholder proposals, is a frequent exempt solicitation filer largely focused on his activism surrounding shareholder rights and other corporate governance issues.

Filer Type	Exempt Solicitations													
	2017		2018		2019		2020		2021		9/30/2022		Total	
	# (161)	% (100)	# (168)	% (100)	# (191)	% (100)	# (212)	% (100)	# (245)	% (100)	# (305)	% (100)	# (1,282)	% (100)
SRI/ESG Asset Manager/Investment Adviser	39	24.2	23	13.7	25	13.1	21	9.9	39	15.9	61	20.0	208	16.2
Hedge Funds	13	8.1	18	10.7	28	14.7	15	7.1	2	0.8	4	1.3	80	6.2
Individuals	1	0.6	30	17.9	23	12.0	19	9.0	29	11.8	33	10.8	135	10.5
Labor Union	33	20.5	33	19.6	25	13.1	34	16.0	55	22.4	30	9.8	210	16.4
Advocacy Organizations	17	10.6	24	14.3	27	14.1	33	15.6	72	29.4	110	36.1	283	22.1
Other Institutional Investors	7	4.3	1	0.6	6	3.1	13	6.1	4	1.6	7	2.3	38	3.0
Other Stakeholders	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	0.7	2	0.2
Public Pension Funds	45	28.0	24	14.3	32	16.8	46	21.7	33	13.5	22	7.2	202	15.8
Private Company	0	0.0	0	0.0	0	0.0	1	0.5	0	0.0	0	0.0	1	0.1
Public Company	0	0.0	0	0.0	0	0.0	3	1.4	0	0.0	1	0.3	4	0.3
Religious Groups	6	3.7	16	9.5	29	15.2	34	16.0	55	22.4	41	13.4	181	14.1

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