
PROXY SOLICITORS:

WHEN to use them & WHAT to ask for

by Artie Regan

Let's face it, if 60% of your outstanding shares are in the hands of 'Officers & Directors' and you're having a routine, boiler plate annual meeting, it's safe to say you really don't *NEED* a proxy solicitor for that meeting. For most of you, however, (in the real world) the majority of your shares aren't in the hands of senior management but behind the ever popular Cede, Kray & Philadep (the 'nominee' names for the three major U.S. securities depositories in New York City, Chicago & Philadelphia). And, while many issuers like to handle their 'Street' (broker/bank) distributions in-house, there are still times when most SEC lawyers and transfer agents would recommend having a professional solicitor involved right from the start. In this article, I'll briefly describe these 'special' situations and afterwards give you some good tips on how to get the most for your shareholders.

WHEN TO USE THEM

- *Non-routine issues.* There are numerous proposals that do not receive discretionary voting privileges. That is, on non-routine items, brokers are not permitted to vote shares in favor of management. Instead, they are only permitted to issue a vote representing the actual returns on the item(s) in question. This reality can be confusing to CEOs who are used to getting 90% quorums due to 'boiler plate' agendas (i.e., the election of directors and the appointment of auditors). Some examples of non-discretionary proposals are: putting in excess of 5% of your outstanding shares into an existing or new stock option plan, creating a staggered/classified board, adding a super majority/fair price provision, reincorporating in Delaware with carry over shark repellents (anti-takeover provisions), creating a holding company with shark repellents, etc ...

Although proposals for Director & Officer liability/indemnification plans are discretionary, they are also popular proposals to oversolicit. An argument can be made that a mandate from the shareholders supporting this policy can be a *very* good thing to have (from a legal point of view) IF your board & management should happen to get sued down the road.

It should also be pointed out that certain non-routine proposals require higher votes to pass them (i.e., two-thirds of the outstanding), which is another reason lawyers and transfer agents prefer having a solicitor hired by the issuer.

- *Mergers, Special Meetings and Consents* With the exception of the lovable 'Special in lieu of Annual Meeting' (in English, this translates into "we didn't get our financials/proxy materials finalized in time to meet our annual meeting constraints so we're having a special meeting to do essentially the same thing"), these situations all tend to be non-routine in nature. For the reasons cited

above, most issuers automatically turn to solicitors when planning for these shareholder related events.

- *Stock/Shark watch services* Shark watching as a regular product/service is now over 10 years old. Many companies pay an annual fee to have a solicitor closely monitor their trading activity, identify *ALL* of the beneficial owners behind all the depository broker/bank positions *and* inform them immediately if a potential acquirer is accumulating a 'toe-hold' position well before any formal announcements would be legally required. Interestingly enough, you can now even pay to get a LARGE amount of shareholder information about a target that you have in your sights *without them knowing it*. What a country!

- *Tender, exchange & rights offers.* These are tricky. With few exceptions, hostile, friendly & self tenders, odd-lot buybacks, exchange offers, rights offers, etc. ... are handled by the "reorg" (reorganization) departments of the broker/bank community. This ultimately means that ADP has a greatly diminished role and that the street distribution required is *totally* different than what you would normally do for a regular proxy or quarterly report mailing. It is prudent to bring in a reasonably priced solicitor for these situations.

- *Proxy Fights.* This is the true solicitor's '*raison d'etre*'. More important than the number of fights their particular firm has been in recently, or even won for that matter, is the amount of personal experience the individual handling your contest has in the fight arena *and* how far he/she will go for you. If you do not know already, ask them — point blank.

Rules come into existence and are broken; in proxy fights *they are shattered*. It is unconscionable what can and does go on during a full blown battle. Everything from exposing self dealing to charges of marital infidelity is used with laser-like precision to get a director's resignation during a fight for board control. If the financier backing your opposition group will stop at nothing, you can expect that his/her solicitor will be equally vicious.

A point to remember. Many 'threatened' fights dissolve before the opposition actually mails its cleared proxy material. Some solicitors charge their clients rather high fight fees that are binding even if the contest 'walks'. Do yourself (*and* your shareholders) a favor and get your solicitor to agree to a two-tier fee, in writing, so that IF the fight dissolves, your fee goes back down to a more normal level. If they're not willing to do it, find a solicitor that will.

HOW TO GET THE MOST FOR YOUR SHAREHOLDERS' \$\$

- *Collect bids, negotiate fees and get 'surrender' clauses.* Even if you're totally satisfied with your solicitor

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and not planning on switching anytime soon, it still can't hurt to know what the competition charges *and* how hungry they are for your business. Receiving a bid or two doesn't cost your company a thing and, who knows, you might actually discover you've been overpaying. At the very least, you could use a lower bid as leverage *IF* your present solicitor tries to raise your fees. Who knows, you may even get a fee reduction; it does happen!

There is also a certain distasteful (to the solicitor) item known as a 'surrender' clause. This paragraph within the solicitor's contract of hire actually guarantees the safe passage, on time, of a specific proposal (or proposals) on a given meeting's agenda. If they fail to perform, the solicitor then eats their solicitation and/or delivery fees. If your solicitor isn't willing to put its fees on the line, you should seriously consider switching to one that will.

- *Get the right INDIVIDUAL solicitor.* This can *NOT* be stressed enough. What good does it do you to hire a 50 year old firm if they end up assigning an individual with only a year's solicitation experience as *your* account representative. Conversely, a smaller solicitor might actually provide you with an account manager with 10 or 20 years in the business. Experience, sophistication *and* competence varies greatly in the solicitation field; if your contact is lacking, *ask for a different one.*

- *ASK QUESTIONS.* Sounds simple, right? Still, you'd be amazed how many issuers look upon their solicitor as a one dimensional search, delivery, proxy collection, tabulation & solicitation agent, incapable of answering even a slightly more sophisticated question. *That's a shame!* It's pretty hard to handle hundreds of shareholders' meetings, mergers, tender offers, proxy fights, etc., without learning a great deal about *LOTS* of things. The words 'I don't know' *only* suggest ignorance to the ignorant.

Some of the smartest executives I know use these words, and LEARN with them.

- *The 'out-of-pocket' expense game.* The 'padding' of expenses is unfortunately an expected practice in the solicitation business. You may not want to think about it, but it's going to happen to you, PERIOD. In routine situations, get your solicitor to put a cap on its expenses *in its contract.*

- *NEVER pay for nothing.* This probably sounds like stating the obvious but, it DOES occur. Solicitors have been known to charge fees for 1) NOT soliciting against you, 2) annual retainers that guarantee that they WILL represent you and then charge you *again* to actually do it, 3) acting as a shareholders' rights agent, etc. ...

ADP's relatively recent purchase of IECA is *NOT* going to eliminate the need for the professional solicitor's services. In fact, the mailing & tabulating problems arising from their merger is actually creating a new surge in the solicitation business.

Just four more quick points.

- *Owner/CEO's ethics will govern.* In terms of fee gouging, overstating expenses, etc. ..., remember that *the owner's personal ethics will govern his/her solicitation*

firm's practices. If it's rotten at the top, don't expect it to be wonderful at the bottom.

- *USE them to the fullest.* Most clients get what they demand *and* most solicitors are *under-utilized.* If you think that your solicitor might be able to help you on an unrelated project *ASK* them to; you might be pleasantly surprised.

- *Don't over-negotiate fee and expense reductions.* One caveat to the general 'wheel and deal' rule. Do *NOT* force your solicitor to work for perceived peanuts. It undermines his/her attitude *and* service. You'll be better off having a lower priced solicitor working content at 'full fee', than a larger, more expensive firm acting half-heartedly because they feel as though they're being cheated.

- *Always remember whose \$\$ you're spending.* Even though the solicitor's fees and expenses are coming out of the corporate coffers, *please* remember that the money being spent belongs to *ALL* of the shareholders. You are spending *THEIR* money. Treat it like your own and *DO the right thing!*

Artie Regan is the President of Regan & Associates, Inc., a proxy solicitation firm based in NYC that specializes in the banking industry and newly public companies.

