

MEMORANDUM

TO: File S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

FROM: Division of Economic and Risk Analysis (“DERA”)¹

SUBJECT: Data analysis of additional definitive proxy materials filed by registrants in response to proxy voting advice

DATE: January 16, 2020

Introduction

On November 5, 2019, the Commission voted to propose amendments to certain exemptions from the proxy rules. The proposing release, “Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice” (“Proposing Release”),² contains a summary of a data analysis in Table 2: Registrant Concerns Identified in Additional Definitive Proxy Materials (“Table”). To prepare the Table, DERA calculated the number of instances that registrants filed additional definitive proxy materials with the Commission in calendar years 2016, 2017, and 2018 to address concerns in response to proxy voting advice provided by a proxy voting advice business.³ This memorandum provides additional information regarding (1) the information the Table is designed to provide, (2) the methodology used in the data analysis, and (3) the identity of the registrant filings underlying the results in the Table.⁴

The Table is designed primarily to provide a tabular approximation of the number of instances registrants indicated concerns over the 2016-2018 period with respect to proxy voting advice in the additional soliciting materials reviewed by the staff. In addition, DERA also reviewed the registrant filings in an effort to provide additional information regarding the types of concerns expressed by registrants. DERA classified the concerns expressed by registrants based on the registrant’s identification(s).⁵

DERA recognizes that reviewers of the registrant filings may reach different conclusions about the classifications (for example, what one reviewer or registrant characterizes as a factual error may be viewed by another reviewer or registrant as a perceived methodological

¹ This is a memo by the Staff of DERA of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or conclusions contained herein.

² Release No. 34-87457 (Nov. 5, 2019) [84 FR 66518 (Dec. 4, 2019)].

³ In the Proposing Release, the Commission recognized that some registrants with concerns about proxy voting advice may not file additional soliciting materials in response to that advice because of timing constraints or if they do not think the effort would have a meaningful impact on votes. *Id.* at 66546. The proposed amendments would also provide registrants with an opportunity to include within that advice a link to the registrant’s response, which would allow the registrant to communicate its views, regardless of whether they are with respect to factual errors, methodological concerns, or other reasons, at the same time as the views of the proxy voting advice business are presented and in a manner the registrant deems most appropriate or effective. *Id.* at 66533.

⁴ The Chairman and other Commissioners have requested this additional information regarding the information the Table is designed to provide and the methodology used to construct the Table.

⁵ See Footnote 239 of the Proposing Release, *supra* note 2, at 66546.

deficiency, or both a factual error and a methodological deficiency). DERA notes that the Table should be viewed in light of these and other considerations applicable to the aggregation and classification of data of this type. DERA’s methodology is discussed in more detail below. The data file with the registrant filings underlying the Table is available [here](#).

Methodology

Once a registrant (or other soliciting person) files a definitive proxy statement with the Commission, it also must file all other written soliciting materials under Exchange Act Rule 14a-6(b). A registrant files the additional soliciting materials on EDGAR under submission type DEFA14A, checking the “Definitive Additional Materials” box on the Schedule 14A cover page.

1. Using keyword search to identify relevant filings

The population for our data analysis consisted of registrant soliciting materials filed on EDGAR under submission type DEFA14A in calendar years 2016, 2017, and 2018. DERA found 5,079, 5,221, and 5,129 DEFA14As filed in 2016, 2017, and 2018, respectively. From this universe of filings, DERA identified possible registrant responses to proxy voting advice by performing a keyword search for any of various permutations of the names of proxy voting advice businesses, or variations of the term “proxy advisor.” Utilizing this keyword search, DERA identified 244, 204, and 213 filings for years 2016, 2017, and 2018, respectively.⁶ A review of these filings showed that they covered a broad range of supplementary information, including registrant responses addressing concerns with proxy voting advice made by proxy voting advice businesses, responses publicizing proxy voting advice in favor of registrant proposals, as well as various unrelated supplemental proxy materials that referred to the names of proxy voting advice businesses in the body of their text but not in any substantive way.

2. Filtering to include only filings that contained registrant responses addressing particular concerns with proxy voting advice

DERA manually reviewed each filing discussed above to classify it as either (i) a qualifying registrant response addressing particular concerns with respect to proxy voting advice or (ii) a non-qualifying registrant response referring to proxy voting advice but not addressing such concerns or some other supplemental proxy materials with no relationship to proxy voting advice. DERA used the following general categories for DEFA14As to qualify a filing for inclusion in our dataset:

⁶ DERA’s keyword searching algorithm matched against a variety of keywords, so the resultant data should have included the most relevant filings. However, because of limitations inherent in keyword searches, there is some possibility that the keyword search algorithm DERA used is underinclusive and did not capture all of the relevant filings.

- The registrant substantively disputed or addressed proxy voting advice that provided a voting recommendation against one or more of the registrant’s proposals.
- The registrant expressed disagreement with the adverse voting recommendation and made a generalized attempt to persuade investors to vote for the proposal, but without directly addressing or critiquing the proxy voting advice business’s rationale.
- The registrant identified explicit changes it made in the current year in response to an adverse voting recommendation that occurred in the current year or prior year.
- The registrant identified changes of circumstance that should warrant reconsideration of an adverse voting recommendation.

DERA used the following general categories for DEFA14As when concluding that a filing did not qualify for inclusion in our dataset:

- The registrant referred to the adverse voting recommendation and indicated some disagreement but did not make any attempt to persuade investors with additional information other than to perhaps reiterate its position on the proposal and urge investors to vote accordingly.
- The registrant cited to the positive voting recommendations provided by a proxy voting advice business and only briefly acknowledged any adverse voting recommendations.
- The registrant identified explicit changes it made to its proposal either in response to discussions with a proxy voting advice business or based on general knowledge of a proxy voting advice business’s guidelines but did not cite to a specific adverse voting recommendation.
- The registrant offered additional clarification or information to a proxy voting advice business for the purpose of securing a specific recommendation without reference to any prior adverse recommendation.
- The filing contained a registrant response that was followed by an identical or nearly identical DEFA14A filed by the same registrant.

Based on this methodology, the resulting data consisted of 99, 77, and 84 DEFA14As filed in 2016, 2017, and 2018, respectively, as summarized in the Table.

Since the date of the Proposing Release, in the relevant filings identified from the keyword search DERA classified additional DEFA14A filings as expressing a registrant concern and reclassified other filings as not expressing a concern. The accompanying data [file](#) lists these additional filings and reclassifications.

3. Classification method of registrant responses

After identifying each DEFA14A that qualified as a registrant response addressing particular concerns with proxy voting advice, DERA classified each filing into categories based on the type of concern that appeared to be expressed by the registrant. Specifically, each registrant's response was classified into one or more of the following categories:

- factual errors;
- analytical errors;
- general or policy disputes;
- amended or modified proposal; and
- other.

The method for the classification of registrant concerns is set forth in footnote 239 of the Proposing Release.⁷ Different reviewers may reach different conclusions about the classifications. As noted above, the Table provides a list designed to describe generally the types of concerns with respect to proxy voting advice expressed by registrants in the additional definitive proxy materials reviewed by DERA.

Data File

The accompanying data [file](#) lists the filings underlying the results in the Table.

⁷ See Proposing Release, *supra* note 2, at 66546.