

sec expands public companies' Disclosure Requirements

The 2009 proxy season saw a record number of shareholder proposals related to climate change directed at a range of industries, including automotive, finance, building, oil, and power generation. Investors are increasingly seeking information from publicly held companies regarding their risk position relative to climate change.

On October 27, 2009, the Division of Corporate Finance of the U. S. Securities and Exchange Commission (SEC) issued Staff Legal Bulletin No. 14E, which addresses shareholder proposals that relate to environmental risks under SEC Rule 14a-8 of the Securities Exchange Act of 1934. Bulletin No. 14E has the potential to add significant new shareholder voting and disclosure obligations on companies that have any impact on the environment. And with these new obligations come attendant liability risks associated with environmental impact disclosures or lack thereof.

Over the past decade the SEC has analyzed requests to exclude shareholder proposals by determining whether the proposal required the company to engage in an evaluation of risk. An evaluation of risk was considered to be related to a company's ordinary business operations and such proposals were excludable pursuant to SEC Rule 14a-8(i)(7). So historically companies were not required to consider shareholder proposals related to corporate assessments of environmental risk exposure.

TIMES AND RULES HAVE CHANGED

The new analytical framework introduced in Bulletin No. 14E focuses on the subject matter of the risk, not whether the proposal requires a company to engage in risk evaluation. Bulletin No. 14E requires a company to include shareholder disclosure proposals relating to environmental risk if:

- The proposal's subject matter raises significant policy issues that transcend the day-to-day business matters of the company; and
- There is a nexus between the nature of the proposal and the company.

With the increase of greenhouse gas regulation, recent judicial activity allowing climate change suits to move forward, and the increased physical effects of climate change, it stands to reason that climate change related proposals will likely be determined to raise significant policy issues that transcend the day-to-day business matters of companies and satisfy the nexus requirement between the nature of the proposal and the company.

It is important to note that there will be significant divergence over the application of the new analytical framework because the language used in Bulletin No. 14E is vague and encompasses a broad array of understandings. The determination of what constitutes a significant policy issue that transcends the day-to-day operation of the business, and what is a sufficient nexus between the company and the nature of the proposal, is open for interpretation.

Bulletin No. 14E narrows the ability of companies to use Rule 14a-8(i)(7) to limit or prevent disclosure of climate change related risks. The new guidance opens the door for investors to request information from publicly held companies regarding the risks of climate change on business performance. Not only are companies more vulnerable to having to disclose

environmental risks to shareholders under the proxy rules, but these risks may soon become material disclosures required by the SEC. Significant volatility related to corporate disclosure requirements is likely.

Publicly held companies desiring assistance with their disclosure obligations concerning climate change related risk should contact the author for a white paper on the SEC's new disclosure requirements.

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