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REPORT

SEC Opens the Door for Climate Change-Related Shareholder Proposals and Disclosure Requirements, With Potential New Liabilities for Public Companies

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The 2009 proxy season saw a record number of shareholder resolutions related to climate change directed at a range of industries, including automotive, building, finance, oil, and power generation.[1] Investors are increasingly seeking information from publicly held companies regarding their relative risk position to climate change. Shareholder resolutions seek information about greenhouse gas emissions, energy usage, and go as far as seeking emissions reduction targets. Shareholders are even requesting financial institutions and banks to adopt resolutions limiting or eliminating their lending and investment relationships with companies that present environmental risk. Historically, companies generally were entitled to exclude environmental requests from proxy materials. However, times and the rules have changed.

On Oct. 27, 2009, the Division of Corporate Finance of the United States Securities and Exchange Commission (SEC) issued Staff Legal Bulletin No. 14E,[2] which addresses shareholder proposals related to environmental risks under SEC Rule 14a-8 of the Securities Exchange Act of 1934. Bulletin 14E has the potential to add significant new shareholder voting and disclosure obligations on companies that have an impact on the environment, or lend to or invest in companies that do.

On Jan. 27, 2010, the SEC held an open meeting and by a 3–2 vote approved an interpretive release issuing guidance on disclosures related to business or legal developments regarding climate change. On Feb. 2, 2010, the SEC issued its formal interpretive release,[3] which was published in the *Federal Register* Feb. 8, 2010 (75 Fed. Reg. 6290). Because the release is interpretative guidance on existing disclosure rules, and not a formal rule, it became immediately effective upon publication, which means companies may have to consider it as they complete their Form 10-Ks for the year ending Dec. 31, 2009. Indeed, the SEC notes in its release that it plans to conduct a public roundtable in "the spring of 2010"

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Miller Canfield's Climate Change Team is committed to maintaining its expertise on these issues and continues to timely follow and understand the latest developments on climate change and climate change regulation.

[1] *See* http://www.incr.com/resolutions.

[2] SEC Staff Legal Bulletin No. 14E (Oct. 27, 2009) (available at http://www.sec.gov/interps/legal/cfslb14e.htm).

[3] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml).

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after 2009 Form 10-Ks are filed to consider the experiences of registrants and the SEC under this release.[4] The SEC's release also contains some potentially significant comments on requirements for Management Discussion & Analysis (MD&A) disclosures. Other securities regulators are following suit.[5] Examples of areas where the SEC says climate change may trigger disclosure requirements include the impact of legislation and regulation, impact of international accords, indirect consequences of regulation or business trends, and physical impacts of climate change.[6] Two members of the U.S. House Committee on Energy and Commerce slammed the interpretive release as effectively functioning as a formal rule without the requirements and safeguards of the time-consuming formal rulemaking process.[7] Other critics are emerging,[8] even within the SEC.[9]

This article examines in Part I the development of SEC shareholder proxy rules and regulations on climate change and provides examples of how shareholders and companies are proceeding under the new proxy rules and regulations. Part II examines shareholder proposals with the SEC that seek to make climate change disclosures material under SEC disclosure rules in addition to any periodic shareholder proxy requests. Part II also summarizes the SEC's recent interpretive guidance regarding climate change disclosures. Finally, Part III analyzes climate change disclosures at the state level, including actions by state insurance regulators and New York's attorney general.

Part I: Shareholder Proxy Rules

Purpose and History of SEC Proxy Rule 14a-8

Rule 14a-8[10] is an SEC regulation that determines when a public company "must include a shareholder's proposal in its proxy statement."[11] A proxy statement is a document the SEC requires a company to send to its shareholders that provides material facts concerning matters on which the shareholders will vote at the annual shareholders meeting. "Rule 14a-8 provides an opportunity for a shareholder owning a relatively small amount of a company's securities to have his or her proposal placed alongside management's proposals in that company's proxy materials for presentation to a vote at an annual or special meeting of shareholders."[12]

Rule 14a-8(i) contains 13 express bases upon which a company may rely to exclude a shareholder proposal from its proxy statement. Under Rule 14a-8(i)(7), a company may exclude a shareholder proposal that seeks information about "[m]anagement functions."[13] So if a shareholder proposal "deals with a matter relating to the company's ordinary business operations," a company does not have to include that proposal in its proxy statement.[14] However, there is an exception to this exception: if a shareholder proposal relates to a company's ordinary business matters but focuses on a "sufficiently significant policy issue," then it "would not be considered to be excludable because the proposal would transcend the day-to-day business matters."[15]

Historically, if a shareholder resolution entailed an evaluation of environmental risk and its impact on the business, the resolution was considered to be related to a company's ordinary business operations, thus entitling the company to a "no action" letter from SEC approving the company's action of exempting the proposal from inclusion with the proxy materials. In other words, environmental issues historically were not considered significant policy issues.

2005—SEC Gives Environmentally-Minded Shareholders a Limited Voice

As the groundswell of support for environmental protection policies grew during the Clinton and Bush Administrations, the SEC ceded some ground on the issue in 2005 when it determined that environmental proposals by shareholders could be a "significant social policy issue" in limited circumstances and thus not excludable from corporate proxy statements under Rule 14a-8(i)(7).[16] However, companies could properly exclude shareholder proposals seeking corporate disclosures about "internal assessments of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health."[17] Thus, the SEC concurred with the view of Xcel Energy Inc. in 2003 that it could exclude a proposal to require its board of directors to disclose the economic risks and benefits associated with the compa-

[4] *See id.* at 28.

[5] *See, e.g.*, Corporate Governance and Environmental Disclosure, Ontario Securities Commission (OSC) Staff Notice 51-717 (Dec. 18, 2009); Environmental Reporting, OSC Staff Notice 51-716 (Feb. 2008).

[6] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 at 21-27 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml); SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010) (available at http://www.sec.gov/news/press/2010/2010-15.htm).

[7] *See* letter from Reps. Joe Barton (R-Texas) and Greg Walden (R-Ore.) to SEC Chairman Mary Schapiro (Jan. 26, 2010) (on file with authors); *see also* Kara Scannell and Siobhan Hughes, *Divided SEC Makes Climate Another 'Risk'*, WALL ST. J., Jan. 28, 2010, at C-1.

[8] *See, e.g.*, Editorial, *Insecurity and Change Commission: Never Mind Madoff, SEC Gumshoes Are on the Climate Beat*, WALL. ST. J., Jan. 29, 2010, at A14 (decrying SEC climate change disclosure guidance as a mechanism to promote the Obama Administration's cap and trade bill, discussed *infra*, and "creating new litigation raw material for the plaintiffs bar").

[9] *See* Kara Scannell, *SEC Discord Could Stymie Schapiro's Efforts*, WALL ST. J., Feb. 6, 2010, at B1 (quoting SEC Commissioner Kathleen Casey, who accused SEC of "placing 'the imprimatur of the commission on the agenda of the social and environmental policy lobby' ").

[10] 17 CFR 240.14a-8.

[11] *Id.*

[12] SEC Staff Legal Bulletin No. 14A (July 12, 2002) (available at http://www.sec.gov/interps/legal/cfslb14a.htm).

[13] 17 CFR 240.14a-8(i)(7).

[14] *Id.*

[15] SEC Staff Bulletin No. 14A & n1 (July 12, 2002) (quoting Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018 (May 21, 1998)).

[16] SEC Staff Legal Bulletin No. 14C (June 28, 2005) (available at http://www.sec.gov/interps/legal/cfslb14e.htm). For information about SEC treatment of environmental issues in the 1970s, see Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82, at 10-11 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml).

[17] SEC Staff Legal Bulletin No. 14C (June 28, 2005) (available at http://www.sec.gov/interps/legal/cfslb14e.htm).

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ny's ''past, present, and future emissions of carbon dioxide, sulfur dioxide, nitrogen oxide, and mercury emissions, and the public stance of the company regarding efforts to reduce these emissions.''[18]

The SEC did require companies to disclose shareholder proposals that ''focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health.''[19] So the SEC did not concur with ExxonMobil in 2005 when it sought to exclude a shareholder request for a report from the company ''on the potential environmental damage that would result from the company drilling for oil and gas in protected areas.''[20] Thus, in 2005, the SEC required companies to include shareholder proposals relating to the environment as long as they were tied to specific operations that may adversely affect the environment, as opposed to internal corporate assessments of general economic risks and policies, which were excludable.

2009—The Environmental Impact of Companies is Now Material

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. The new guidance offered by Bulletin No.14E requires (1) the proposal's subject matter to raise significant policy issues that transcend the day-to-day business matters of the company, and (2) a nexus between the nature of the proposal and the company. ''The fact that a proposal would require an evaluation of risk will not be dispositive of whether the proposal may be excludable.''[21]

With the increase in greenhouse gas regulation, recent federal judicial activity allowing climate change suits to move forward, the increased policy implications related to climate change, and the SEC's new guidance outlining some of the effects climate change may have on businesses and their reporting requirements, the argument will likely be that climate change-related proposals will 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. Proposals that involve ordinary business matters will continue to be excludable under Rule 14a-8(i)(7).

Bulletin No.14E calls into question whether companies may rely on Rule 14a-8(i)(7) to exclude a shareholder proposal relating to climate change related risk. It is important to note that a ''no action'' letter from the SEC is an informal view of the commission and does not necessarily protect a company from legal action should the company decide to exclude the proposal from its proxy statement based on a no action letter.[22]

2009 Proxy Season—Corporate America and Financial Companies Respond

Apple Inc. included two shareholder climate change proposals in its proxy statement for its annual shareholders meeting in February 2010.[23] Apple took this opportunity to provide its view on the proposals as well as tout its progress and successes in helping to combat carbon emissions and climate change.

The first proposal seeks a sustainability report describing Apple's strategy to reduce greenhouse gas emissions and address other environmental impacts associated with corporate operations. Apple opposes the proposal and went to great lengths to describe the numerous steps it has taken to account for and reduce its carbon footprint in all aspects of its operations. Apple asserts its level of environmental transparency exceeds that of its competitors, and in many areas exceeds the amount of information sought by the shareholder proposal.

The second proposal requests the addition of a board committee on sustainability. The board would focus on making policy recommendations to Apple on how to reduce its environmental impact. Apple opposes this proposal as well. Apple avers that having a separate board dedicated to sustainability issues would not be more effective than the current board of directors because the company is already highly committed to reducing its environmental impact.

Apple's response to shareholder proposals seeking climate change disclosure offers strategic disclosure guidance to companies that may not be granted ''no action'' requests to exclude these shareholder proposals from proxy statements. Moreover, there may be strategic reasons to forgo seeking a no action letter from the SEC and instead take on the shareholder request with a reasoned response in the company's proxy materials, perhaps articulating the company's environmental viewpoints and accomplishments to shareholders.

Financial and banking companies also feel the effect of climate change-related disclosures. Certain institutional investors and asset managers are demanding that financial companies and banks restrict or limit lending or investment relationships with companies that present environmental risk. These resolutions are noteworthy because of the potentially significant implications on the banking and financial industries, especially in light of the SEC's recent interpretation of what registrants should consider when making climate change disclosures in their Management Discussion & Analysis,[24] discussed *infra*.

Part II: SEC Corporate Disclosure

Petition to Require the Disclosure of Climate Change Risk of Public Companies

Large institutional shareholders and asset managers with trillions of dollars of assets have filed a petition for interpretative guidance on climate risk disclosure with the SEC.[25] The petition specifically requests the SEC to require climate-related information to be included with corporate disclosures under the current regulatory in-

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] SEC Staff Legal Bulletin No. 14E (Oct. 27, 2009) (available at http://www.sec.gov/interps/legal/cfslb14e.htm).
[22] SEC Staff Legal Bulletin No. 14 (July 13, 2001) (available at http://www.sec.gov/interps/legal/cfslb14.htm).

[23] *See* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjYwMTN8Q2hpb GRJRD0tMXxUeXBlPTM=&t=1.
[24] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82, at 7-9, 15-21 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml).
[25] *See* http://www.sec.gov/rules/petitions/2007/petn4-547.pdf.

frastructure. The petition was originally filed in September 2007. It was supplemented in November 2009 to reflect the significant developments in carbon regulation and governmental policy towards climate change.[26]

These investors reason that with the rise in recent scientific, legal, and regulatory developments related to climate change, a reasonable investor could deem climate change-related information material and thereby subject to SEC disclosure requirements. ''A fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.''[27] The investors are petitioning the SEC to require the disclosure of physical risks associated with climate change, the financial risks associated with present or probable regulation of greenhouse gas emissions, and legal proceedings derived from climate change.

The investors posit that the physical risks of climate change should be disclosed under Item 303 of Regulation S-K. Item 303 mandates the discussion of factors bearing materially on the company's financial condition and business operations, including identification of known trends or uncertainties expected to have a material impact on liquidity, capital resources, net sales, revenues, or income from continuing operations.[28] The investors assert climate change bears on the financial conditions of companies and is a known trend and thus should be disclosed to investors. In its recent release, the SEC discusses the proposals in these institutional investor petitions.[29] The SEC also covers in some detail various nonprofit, special interest agencies to which some companies make climate change disclosures, including the Climate Registry, the Carbon Disclosure Project, and the Global Reporting Initiative (GRI).[30] *See* discussion *infra*.

While courts have found a failure to disclose under Item 303 does not itself provide a basis for claims under the securities laws, some courts do hold that material omissions under Item 303 create cognizable claims under section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 implemented thereunder.[31] A full review of this issue is outside the scope of this article, but the potential for securities fraud claims based on violations of Item 303 should be noted.[32]

The investors also claim public companies should disclose the financial risks of climate change under Item 101 of Regulation S-K. Item 101 requires the disclosure of ''the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.''[33] The proliferation of greenhouse gas emissions regulation at federal, state, regional, and local levels likely will have an impact on the capital expenditures, earnings, and competitiveness of public corporations, which therefore may have to be disclosed pursuant to Item 101.

Additionally, investors seek disclosures of judicial or administrative proceedings arising under laws intended to protect the environment under Item 103 of Regulation S-K.[34] There have been judicial decisions significant for their recognition of a connection between emissions and increases in the effects of climate change. This raises the question whether companies may be required to determine if these judicial and administrative proceedings and decisions must be disclosed under Item 103.

SEC Formalizes the Climate Change Developments Above in an Interpretive Release

On Jan. 27, 2010, the SEC held an open meeting and by a 3–2 vote approved an interpretive release issuing guidance on disclosures related to business or legal developments regarding climate change. On Feb. 2, 2010, the SEC issued its formal interpretive release.[35] Because the release is interpretative guidance on existing disclosure rules and not itself a formal rule, it became immediately effective upon publication in the *Federal Register* Feb. 8, 2010, which means companies may have to consider it as they complete their Form 10-Ks for 2009. Indeed, the SEC notes in its release that it plans to conduct a public roundtable in ''the spring of 2010'' after 2009 Form 10-Ks are filed to consider the experiences of registrants and the SEC under this release.[36] The SEC's release also contains some potentially significant comments on requirements for Management Discussion & Analysis (MD&A) disclosures. Two members of the U.S. House Committee on Energy and Commerce slammed the interpretive release as effectively functioning as a formal rule without the requirements and safeguards of the time-consuming formal rulemaking process.[37]

The SEC provides in its release some examples of areas ''where climate change may trigger disclosure requirements.''[38] The SEC's examples correspond with

[26] *See* http://www.ceres.org/Document.doc?id=509.

[27] SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (Aug. 19, 1999) (quoting *TSC Industries v. Northway, Inc.* 426 U.S. 438, 449 (1976)).

[28] 17 CFR 229.303(a).

[29] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82, at 7 n. 20 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml); *see also* Kara Scannell, *SEC Discord Could Stymie Schapiro's Efforts*, WALL ST. J., Feb. 6, 2010, at B1 (quoting SEC Commissioner Kathleen Casey, who accused the SEC of ''placing 'the imprimatur of the commission on the agenda of the social and environmental policy lobby' '').

[30] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82, at 7-10.

[31] *See, e.g., In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63 (2d Cir. 2001); *In re Corning Inc. Sec. Litig.*, 349 F. Supp. 2d 698, 715-17 (S.D.N.Y. 2004).

[32] There are equally compelling arguments that a violation of Item 303 of Regulation S-K does not create liability under section 10(b) or Rule 10b-5. *See, e.g., Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000).

[33] 17 CFR 229.101(c)(xii).

[34] 17 CFR 229.103 & Instruction 5.

[35] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml).

[36] *See id.* at 28.

[37] *See* Letter from Reps. Joe Barton (R-Texas) and Greg Walden (R-Or.) to SEC Chairman Mary Schapiro (Jan. 26, 2010) (on file with authors); *see also* Kara Scannell and Siobhan Hughes, *Divided SEC Makes Climate Another 'Risk'*, WALL ST. J., Jan. 28, 2010, at C-1.

[38] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 at 21-27 (Feb. 2, 2010) (available at http://www.sec.gov/rules/

   ISSN 0037-0665

the climate change areas and subjects that have developed over the years, as analyzed in this article:

■ **Impact of Legislation and Regulation:** When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company also should evaluate the potential impact of pending legislation and regulation related to this topic.

■ **Impact of International Accords:** A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change.

■ **Indirect Consequences of Regulation or Business Trends:** Legal, technological, political, and scientific developments regarding climate change may create new opportunities or risks for companies. For instance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions than competing products. As such, a company should consider for disclosure purposes the actual or potential indirect consequences it may face due to climate change-related regulatory or business trends.

■ **Physical Impacts of Climate Change:** Companies also should evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their business.[39]

Given that these examples from the SEC have been taken from the historical climate change developments analyzed herein, this article may be a good starting point in assessing how the SEC may seek to apply these examples in future disclosure debates and actions.

As significant as its overview of the climate change disclosure subjects above, the SEC sets forth a detailed and interesting discussion of climate change and MD&A disclosures in general. The SEC covers in some detail various nonprofit, special interest agencies to which some companies make voluntary climate change disclosures, including the Climate Registry, the Carbon Disclosure Project, and the Global Reporting Initiative (GRI).[40] The SEC also cites to a study by Ceres, an environmental investor and public interest organization, that tracks climate change disclosures in the Form 10-Ks of certain companies.[41] The SEC is particularly descriptive of GRI:

> The GRI framework sets out principles and indicators organizations can use to measure and report their economic, environmental, and social performance, including issues involving climate change. Sustainability reports based on the GRI framework are used to benchmark performance with respect to laws, norms, codes, performance standards and voluntary initiatives, demonstrate organizational commitment to sustainable development, and compare organizational performance over time.[42]

These references by the SEC are significant because after this statement, the SEC counsels registrants they may have to disclose this type of information: ''Although much of this reporting is provided voluntarily, ***registrants should be aware that some of the information they may be reporting pursuant to these mechanisms also may be required to be disclosed in filings made with the Commission pursuant to existing disclosure requirements***.''[43]

This statement begs several questions: should companies refer to the standards of GRI or other climate change organizations when drafting their MD&A disclosures? Are these and other special interest standards required MD&A disclosures? Should companies register with Ceres, which the SEC cites as documenting Form 10-K climate change disclosures by certain companies? Is a disclosure analysis of these voluntary climate change agency filings in a company's MD&A only triggered when a company actually reports climate change issues to GRI and other like ''mechanisms''?

The SEC stops short of mandating its own standards and instead reminds registrants they must exercise their own judgment when deciding whether something is material and thus required to be disclosed to the SEC pursuant to the MD&A disclosure rules in Regulation S-K,[44] discussed *supra*. The SEC notes it has had to ''remind registrants . . . that the disclosure provided in response to this requirement should be clear and communicate to shareholders management's view of the company's financial condition and prospects.''[45]

But the SEC also suggests companies not disclose too much information in their MD&A disclosure because ''the effectiveness of MD&A decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information. Registrants drafting disclosures should focus on material information and eliminate immaterial information that does not promote understanding of registrant's financial condition, liquidity and capital resources, changes in financial condition and results of operations.''[46]

However, the SEC also states that although the process of eliminating immaterial information ''may limit what is actually disclosed,'' registrants are still ''expected to consider all the relevant information even if that information is not required to be disclosed.''[47] To ensure registrants consider the ''substantial amount of financial and non-financial information available to them, including information that itself may not be required to be disclosed,'' the SEC counsels registrants to ''consider whether they have sufficient disclosure controls and procedures to process this information.''[48]

The SEC also advises companies to consider whether they should report the ''indirect risk'' to their ''reputa-

interp.shtml); SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010) (available at http://www.sec.gov/news/press/2010/2010-15.htm).

[39] SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010) (available at http://www.sec.gov/news/press/2010/2010-15.htm).

[40] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82, at 7-10 (Feb. 2, 2010) (available at http://www.sec.gov/rules/interp.shtml).

[41] *See id.* at 7, n. 20.

[42] *Id.* at 9.

[43] *Id.* at 10 (emphasis added).

[44] ''The nature of certain MD&A disclosure requirements places particular importance on a registrant's materiality determinations [pursuant to Item 303 of Regulation S-K].'' *Id.* at 18.

[45] *Id.* at 16.

[46] *Id.* at 18.

[47] *Id.* at 18-19.

[48] *Id.* at 19-20.

tional damage'' from the various ''financial and non-financial'' information referenced above that relates to climate change:

> An example of potential indirect risk from climate change that would need to be considered for risk factor disclosure is the impact on a registrant's reputation. Depending on the nature of a registrant's business and its sensitivity to public opinion, a registrant may have to consider whether the public's perception of any publicly available data relating to its greenhouse gas emissions could expose it to potential adverse consequences to its business operations or financial condition resulting from reputational damage.[49]

It is unclear from the SEC's release whether and to what extent companies must disclose ''reputational damage'' from various expressions of displeasure from various environmental or other interest groups in the vast amount of ''any publicly available data.'' Taken to its extreme, such disclosure requirements could affect a range of industries, including automotive, finance, building, oil, and power generation.

The SEC also appears to take a position on the very controversial climate change causation debate when it remarks that a 2007 Government Accountability Office report ''cites a number of sources to support the view that severe weather scenarios will increase as a result of climate change brought on by an overabundance of greenhouse gases.''[50] Lending credence to this report, the SEC counsels that ''[r]egistrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents.''[51]

Though it did not publish specific standards, the SEC did provide various examples of scenarios companies may have to consider in determining whether to disclose events relating to climate change, including but not limited to the following:

- ''Registrants should consider specific risks they face as a result of climate change legislation or regulation and avoid generic risk factor disclosure that could apply to any company.''[52]
- ''[R]egistrants must also consider any financial statement implications of climate change issues in accordance with applicable accounting standards, including Financial Accounting Standards Board (FASB) Accounting Standards Codification Topic 450, Contingencies, and FASB Accounting Standards Codification Topic 275, Risks and Uncertainties.''[53]
- Registrants should be prepared to report the costs, profits, credits and other ''financial consequences'' of a ''cap and trade regime'' if and when one becomes effective,[54] including specific reference to the American Clean Energy and Security Act of 2009 passed by the House[55] and the Clean Energy Jobs and American Power Act of 2009 introduced in the Senate.[56]
- Registrants must consider whether their ''businesses are reasonably likely to be affected'' by treaties or international accords, such as the Kyoto Protocol, adopted Dec. 11, 1997, and effective Feb. 16, 2005; the European Union Emissions Trading System, which was built upon the mechanisms under the Kyoto Protocol and which is an international ''cap and trade'' allowance system; and the Copenhagen Accord, which is the product of the United Nations Climate Change Conference, which took place in December 2009 in Copenhagen, Denmark.[57]
- Companies should follow ''legal, technological, political and scientific developments regarding climate change'' and the effects these developments may have on the increase or decrease in demands for goods that produce higher or lower greenhouse gas emissions as well as increased competition and demand for products and innovative technologies that reduce greenhouse gas emissions.[58]
- ''Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents,'' including the effects of severe weather disruptions on manufacturing operations; supply chain; and increased insurance claims, deductibles, liabilities, and premiums.[59]

Part III: State Action on Climate Change

Company Agrees to Disclose Climate Change Risk in SEC Form 10-K Filings

New York Attorney General Andrew Cuomo reached an agreement with AES Corporation Nov. 19, 2009.[60] The agreement requires AES to disclose information to investors concerning the expected impact of climate change and the regulation of greenhouse gases on the company's operational and financial condition.

The company voluntarily agreed to disclose financial risk information in its SEC Form 10-K filing, including analysis of:

- financial risks from greenhouse gas regulation,
- financial risks from litigation related to climate change,
- physical impacts of climate change to the company's operation, and
- climate change risk and emissions management.

The agreement is the third of its kind. In 2007, Cuomo subpoenaed five energy companies, including AES, seeking information regarding the companies' fi-

[49] *Id.* at 26.
[50] *Id.* at 26.
[51] *Id.* at 27.
[52] *Id.* at 22. The SEC outlines the analytical steps companies must take under Item 303 of Regulation S-K when determining whether ''any enacted climate change legislation or regulation is reasonably likely to have a material effect on the registrant's financial condition or results of operation,'' thus requiring disclosure. *See id.* at 22-23.
[53] *Id.* at 22 n. 69.
[54] *Id.* at 23-24.
[55] *See id.* at 2 n. 4, 3 nn. 8-9 (citing American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., (1st Sess. 2009), passed by the House of Representatives June 26, 2009).
[56] *See id.* (citing Clean Energy Jobs and American Power Act of 2009, S. 1733, 111th Cong. (1st Sess 2009), introduced in the Senate Sept. 30, 2009).
[57] *See id.* at 24 & 2 nn.1-2.
[58] *See id.* at 25. The SEC notes that developments like these may trigger disclosure under Item 101 of Regulation S-K if the developments ''have a significant enough impact on a registrant's business.'' *Id.*
[59] *See id.* at 26-27.
[60] *See* http://www.oag.state.ny.us/media_center/2009/nov/nov19a_09.html.

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nancial risk related to climate change and whether such risks should be disclosed to investors in their SEC filings. Two of the companies settled in 2008 by signing similar agreements. The investigations of the other companies remain unresolved.

NAIC Adopts Rule Requiring the Disclosure of Climate Change-Related Risk

In March 2009, the National Association of Insurance Commissioners (NAIC) announced a rule requiring mandatory disclosure of climate change risk to regulators.[61] The decision whether to compel disclosure rests with the insurance department of each state; NAIC cannot compel a state to require the disclosures. However, if the insurer group writes policies in states that have adopted the disclosure requirements, then the insurer must comply. If an insurer group is subject to the disclosure requirements, companies would be required to respond to arguably broad and ambiguous questions about their risk of future loss related to climate change starting in May 2010. According to NAIC, the disclosure requirements will affect approximately 300 insurer groups.

Among other questions, the disclosure questionnaire includes the following:

- Does the company have a plan to assess, reduce, or mitigate its emissions in its operations or organizations? If yes, please summarize.
- Summarize the current or anticipated risks climate change poses to the company. Explain the ways these risks could affect the business. Include identification of the geographical areas affected by these risks.
- Has the company considered the impact of climate change on its investment portfolio? Has it altered its investment strategy in response to these considerations? If so, please summarize the steps taken.

The impact of climate change on the climate system and businesses is multifaceted, posing complex challenges to accurately disclosing the risk faced by the insurance industry. Additionally, the disclosed information will be public information, possibly exposing companies to liability based on their knowledge of the harms and risks of climate change. However, as complex as these risk disclosures are to the insurance industry, confronting them appears unavoidable because, as reported by the SEC, ''climate change [is] the number one risk facing the insurance industry.''[62] Indeed, the SEC reports ''that insurance companies are developing new actuarial models and designing new products to reshape coverage for green buildings, renewable energy, carbon risk management and directors' and officers' liability, among other actions.''[63]

The ambiguous nature of the disclosure questions above and the information contained therein, and the SEC's statements about the significant effects of climate change on the insurance industry and its disclosures, are likely to raise significant legal questions, especially in light of the recent judicial decisions recognizing climate change.

Conclusion

Bulletin No.14E broadens the applicability of Rule 14a-8 and the proxy rules to climate change-related risk. The new guidance offered by Bulletin No.14E opens the door for investors to request information from publicly held companies regarding the risks of climate change on business performance. 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.

In addition to episodic shareholder proxy requests for climate change disclosures, the SEC is considering more permanent rules that could make climate change disclosures material and thus required under SEC disclosure rules. The SEC's most recent interpretative guidance signifies the commission is open to considering climate change disclosures as material. And not only must companies ensure compliance with federal laws and regulations, individual states are now moving to regulate companies and industries that affect them.

While this fast-paced climate change regulation is challenging, it also presents exciting opportunities for companies to capitalize on the emerging climate change sector and take advantage of the sector's recency by understanding it, how it is viewed by the relevant regulators, and perhaps even helping shape its direction.[64]

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[61] *See* http://www.naic.org/Releases/2009_docs/climate_change_risk_disclosure_adopted.htm.

[62] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82, at 5 (Feb. 2, 2010) (*available at* http://www.sec.gov/rules/interp.shtml).

[63] *Id.* (citing Klein, Christopher, *Climate Change, Part IV: (Re)insurance Industry Response*, May 28, 2009 (available at http://www.gccapitalideas.com/2009/05/28/climate-change-part-iv-reinsurance-industry-response)).

[64] *See, e.g.*, Russell Gold, *Investment Dollars Flow To Green Energy Start-Ups*, WALL ST. J. at B1 (Feb. 4, 2010).