

January 2014

## Can Shareholders Bring the Sun to Climate Change Disclosure - Reflections on Shareholders' Power to Fix Environmental Problems through Proposals on Climate Change

Marlene Martin

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

---

### Recommended Citation

Martin, Marlene (2014) "Can Shareholders Bring the Sun to Climate Change Disclosure - Reflections on Shareholders' Power to Fix Environmental Problems through Proposals on Climate Change," *Wyoming Law Review*. Vol. 14 : No. 1 , Article 10.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol14/iss1/10>

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

COMMENT

**Can Shareholders “Bring the Sun” to Climate Change Disclosure?—  
Reflections on Shareholders’ Power to Fix Environmental Problems  
Through Proposals on Climate Change**

*Marlene Martin\**

I.	INTRODUCTION .....	289
II.	BACKGROUND .....	292
	A. <i>Climate Change Risks</i> .....	292
	B. <i>The Proxy and Shareholder Proposal Process</i> .....	294
	C. <i>The “Ordinary Business Operations” Exclusion under Rule 14a-8(i)(7)</i> .....	296
	D. <i>SEC Disclosure Requirements for Publicly-held Corporations</i> .....	298
	E. <i>The Power of the SEC to Issue Interpretive Guidance</i> .....	302
	F. <i>The SEC Interpretive Guidance on Climate Change Disclosure</i> .....	303
	G. <i>The SEC Decision in the PNC Financial Services Group No-Action Request</i> .....	307
III.	ANALYSIS.....	311
	A. <i>The SEC Recognizes Climate Change as a “Significant Policy” Issue</i> .....	311
	B. <i>The Importance of the PNC Decision for Others</i> .....	312
	C. <i>Limitations of the PNC No-Action Letter</i> .....	314
	D. <i>Thoughts about the Shareholder Proposal Process and its Role for Enhanced Climate Change Disclosure</i> .....	318
	E. <i>The Role of the SEC Climate Change Guidance in Enhancing Disclosure</i> .....	320
IV.	CONCLUSION.....	323

I. INTRODUCTION

Publicity is justly commended as a remedy for social and industrial diseases.  
Sunlight is said to be the best of disinfectants . . . .<sup>1</sup>

—Justice Louis D. Brandeis

---

\* J.D., University of Wyoming College of Law, 2013. I would first and foremost like to thank the 2013–2014 *Wyoming Law Review* Editorial Board, particularly, Julianne Gern, Lucas Wallace, and Brian Fuller, for their valuable comments and time spent editing this Comment. I would also like to thank Professor Sam Kalen for his inspiration and guidance while writing this Comment. Last, I thank my family for their support and patience.

<sup>1</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1914). When Justice Brandeis wrote *Other People’s Money: and How the Bankers Use It*, he had not yet been

In the passage quoted above, Justice Brandeis was expounding on the theory underlying federal securities laws that require public corporations to disclose certain information in an effort to make securities markets fairer and more efficient.<sup>2</sup> Because shareholders of large publicly traded corporations often have little influence on the conduct of those corporations, securities disclosure is used in various ways to influence a wide range of corporate behavior.<sup>3</sup>

Climate change is among the issues where shareholders hope to influence corporate behavior through disclosure. Today, climate change is one of the most important policy issues facing the world.<sup>4</sup> More importantly, climate change affects everyone, be it through droughts, floods, rising sea levels, or heat waves.<sup>5</sup> Scientific consensus is that human activities have the largest influence on recent climate change, mainly through the release of carbon dioxide and other greenhouse gases into the atmosphere.<sup>6</sup>

In recent years, shareholders have started filing sustainability-related resolutions asking companies to set greenhouse gas emission reduction goals,

---

appointed to the United States Supreme Court. He was appointed in 1916. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> (last visited Nov. 12, 2013).

<sup>2</sup> Brandeis, *supra* note 1; see also Laura S. Unger, Speech by SEC Acting Chairman: This Year's Proxy Season: Sunlight Shines on Auditor Independence and Executive Compensation (June 25, 2001), <http://www.sec.gov/news/speech/spch502.htm> (last visited Nov. 12, 2013).

<sup>3</sup> RUSSELL B. STEVENSON, JR., CORPORATIONS AND INFORMATION – SECRECY, ACCESS, & DISCLOSURE 81–82 (1980).

<sup>4</sup> Margaret Rosso Grossman, *Climate Change and the Law*, 58 AM. J. COMP. L. 223, 223 (2010); Cinnamon Carlarne, *Notes From a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in USA*, 40 CONN. L. REV. 1351, 1353 (2008); Michael B. Gerrard & J. Cullen Howe, *Global Climate Change: Legal Summary*, SS028 ALI-ABA 583, 585 (2011). Regardless of one's personal views about climate change, most agree that climate change could have material financial impacts on many businesses, especially through increased costs of regulatory compliance or changes in the competitive environment. PATRICIA THROWER BARMAYER ET AL., *THE SEC AND CLIMATE: DISCLOSURE REQUIREMENTS 1* (Bradley M. Marten ed., 2010).

<sup>5</sup> ENVIRONMENTAL PROTECTION AGENCY, *Climate Change: Basic Information*, <http://www.epa.gov/climatechange/basics/> (last visited Nov. 12, 2013). Climate change and global warming are not the same. As the EPA explains in the following excerpt:

Global warming refers to the recent and ongoing rise in global average temperature near Earth's surface. It is caused mostly by increasing concentrations of greenhouse gases in the atmosphere. Global warming is causing climate patterns to change. However, global warming itself represents only one aspect of climate change. Climate change refers to any significant change in the measures of climate lasting for an extended period of time. In other words, climate change includes major changes in temperature, precipitation, or wind patterns, among other effects, that occur over several decades or longer.

*Id.*

<sup>6</sup> *Id.*; see also James Flynn, *Climate of Confusion: Climate Change Litigation in the Wake of American Electric Power v. Connecticut*, 29 GA. ST. U. L. REV. 823, 823–24 (2013); John C. Dernbach & Seema Kakade, *Climate Change Law: An Introduction*, 29 ENERGY L.J. 1, 4 (2008).

publish sustainability reports, and pursue energy efficiency.<sup>7</sup> Not until the 2013 proxy season, have shareholders filed resolutions asking companies to disclose physical risks that climate change poses.<sup>8</sup> This comes two years after the Securities and Exchange Commission (SEC) published its “Interpretive Guidance Regarding Disclosure Related to Climate Change” (Climate Change Guidance).<sup>9</sup> Although the SEC intended to guide companies with regard to their existing disclosure obligations and not to introduce new rules, shareholders are relying upon the Climate Change Guidance to request additional disclosures from companies.<sup>10</sup> Investors hope the new disclosure scheme will lead to changes in companies’ behavior and internal processes regarding greenhouse gas emissions.<sup>11</sup>

One case that recently drew attention involved PNC Financial Services Group, Inc. (PNC). The SEC staff denied PNC’s no-action request for excluding a shareholder proposal from its proxy ballot.<sup>12</sup> The proposal asked the company to assess greenhouse gas emissions resulting from its lending portfolio as well as PNC’s exposure to climate change risk.<sup>13</sup> The SEC staff believed that climate change is a significant social and public policy issue, and PNC could not exclude a proposal addressing climate change.<sup>14</sup>

This Comment argues the SEC staff decision was an important step towards recognizing climate change and its impact on corporations. But as important a step as the SEC staff decision was, shareholder power remains limited. Part II will outline the importance of climate change, discuss the shareholder proxy rules, and

---

<sup>7</sup> Avery Fellow, *Investors Demand Climate-Risk Disclosure in 2013 Proxies*, BLOOMBERG (Feb. 25, 2013, 1:34pm MT), <http://www.bloomberg.com/news/2013-02-25/investors-demand-climate-risk-disclosure-in-2013-proxies.html> (last visited on Nov. 12, 2013).

<sup>8</sup> *Id.* A proxy is an authorization issued by a shareholder to another person to represent him or act for him at a shareholders’ meeting. BLACK’S LAW DICTIONARY 1346 (9th ed. 2009). Because most shareholders choose to vote by proxy rather than attend a shareholders’ meeting in person, the time when these annual shareholders’ meetings are held and when the accompanying proxies are solicited is commonly referred to as proxy season. The proxy season usually runs from February to May each year. See Proposed Rule on Internet Availability of Proxy Material, Exchange Act Release No. 52,926, Investment Company Act Release No. 27,182, 86 SEC Docket 3163, 96 n.104 (proposed Dec. 8, 2005) (LEXIS) (referring to data by Automatic Data Processing, Inc. (now Broadridge Financial Solutions, Inc.) which handles the vast majority of proxy mailings to beneficial owners for companies)).

<sup>9</sup> Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 33-9106; Exchange Act Release No. 34-61469, 75 Fed. Reg. 6290-01 (Feb. 8, 2010).

<sup>10</sup> *Id.* at 6290 (stating that the release outlines the view of the Commission “with respect to our existing disclosure requirements as they apply to climate change matters”).

<sup>11</sup> Mia Mazza, Andrew Thorpe & Robert L. Falk, *Challenges in Implementing the SEC’s New Interpretive Guidance on Climate Change*, 26(4) CORP. COUNS. Q. 6 (2010).

<sup>12</sup> PNC Financial Services Group, Inc., SEC No-Action Letter, 2012 WL 6760041 (Feb. 13, 2013).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1.

outline the requirements for climate change disclosure set by the SEC Climate Change Guidance.<sup>15</sup> Part III of this Comment will analyze the PNC proposal and the SEC reaction in light of the Climate Change Guidance and the effect of the PNC decision on other companies.<sup>16</sup>

## II. BACKGROUND

### A. *Climate Change Risks*

Climate change-related proposals similar to the one shareholders requested from PNC are likely to increase in the future as environmental concerns among shareholders grow.<sup>17</sup> Climate change means a “significant and persistent change in the mean state of the climate or its variability” caused by changes in the environment.<sup>18</sup> It is one of the most important global environmental problems facing the world today.<sup>19</sup> The year of 2012 was the warmest twelve-month period in the United States since 1895.<sup>20</sup> During 2012, the United States faced a devastating drought throughout the West and Midwest, record wildfire activity, near-record low Great Lakes levels, and Hurricane Sandy, which destroyed large parts of New York City and New Jersey’s shore.<sup>21</sup> These extreme weather events may have been the result of climate change.<sup>22</sup> They could also be precursors of extreme weather events predicted to occur in the future as a result of climate change.<sup>23</sup>

Climate change affects everyone, including publicly traded companies.<sup>24</sup> Some climate change risks affect companies directly, like those in the agriculture industry where companies have to adapt to changing weather patterns or severe

<sup>15</sup> See *infra* Part II., A–C.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See, e.g., Fellow, *supra* note 7 (citing a study by the Investor Responsibility Research Center Institute showing an increased support for such resolutions between 2005 and 2011).

<sup>18</sup> Grossman, *supra* note 4, at 224 (citing US GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE LITERACY: THE ESSENTIAL PRINCIPLES OF CLIMATE SCIENCE 17 (2009)).

<sup>19</sup> *Id.* at 223.

<sup>20</sup> PNC No-Action Letter, *supra* note 12, at 8 (Boston Common Asset Management, LLC citing National Climatic Data Center Website, State of the Climate National Overview Annual 2012, National Oceanic and Atmospheric Administration, <http://www.ncdc.noaa.gov/sotc/national/2012/13>).

<sup>21</sup> *Id.*

<sup>22</sup> Coral Davenport, *The Scary Truth About How Much Climate Change is Costing You*, THE NATIONAL JOURNAL (Feb. 7, 2013), available at <http://www.nationaljournal.com/member/magazine/the-scary-truth-about-how-much-climate-change-is-costing-you-20130207>.

<sup>23</sup> Karl Ritter, *United Nations’ Climate Negotiations Underway in Qatar*, USA TODAY, Nov. 27, 2012, <http://www.usatoday.com/story/weather/2012/11/27/climate-change-hurricane-sandy/1730251/>.

<sup>24</sup> EPA, *supra* note 5. For example, Wall Street and the New York Stock Exchange shut down for several days after Sandy. See Davenport, *supra* note 22.

weather impacting plants and manufacturing facilities.<sup>25</sup> Some climate change risks only affect companies indirectly; for example, through increased regulation of emission controls.<sup>26</sup> Other companies, especially in the financial sector, are affected only through shares or investments held in companies affected by climate change.<sup>27</sup> In the past several years, there has been a shift to increased interest in disclosure on how climate change might affect current and future operations of publicly traded companies.<sup>28</sup> During the same period, a second, arguably related, shift toward more sustainable corporate practices has also occurred.<sup>29</sup>

Investors, especially those with obligations to retain long-term value, such as state pension funds, are at the forefront of the push for climate change disclosure.<sup>30</sup> They argue that climate change will affect a company's market value.<sup>31</sup> To achieve greater disclosure, these investors have pressured legislatures and regulators to establish rules on climate change disclosure.<sup>32</sup> Investors can also pressure companies directly through the shareholder proposal process.<sup>33</sup> In the past, such

---

<sup>25</sup> Jeffrey A. Smith, Danielle Sugarman & Robert J. Stein, *Sustainability Disclosure: Proxy Exclusion & The Impact of SEC's Decision in PNC Financial*, 72 WASH. LEGAL FOUND. (WLF) 6 (May 2013), available at [http://www.wlf.org/upload/legalstudies/contemporarylegalnote/05-2013SmithSugarmanStein\\_ContemporaryLegalNote.pdf](http://www.wlf.org/upload/legalstudies/contemporarylegalnote/05-2013SmithSugarmanStein_ContemporaryLegalNote.pdf).

<sup>26</sup> COALITION FOR ENVIRONMENTALLY RESPONSIBLE ECONOMIES (CERES), GLOBAL FRAMEWORK FOR CLIMATE RISK DISCLOSURE 4 (Oct. 2006), available at <http://www.ceres.org/resources/reports/global-framework-for-climate-risk-disclosure-2006/view>; PETITION FOR INTERPRETIVE GUIDANCE ON CLIMATE RISK DISCLOSURE, No. 4-547, 29 (Sept. 18, 2007), <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf>.

<sup>27</sup> BETTINA FURRER, VOLKER HOFFMANN & MARION SWOBODA, BANKING & CLIMATE CHANGE: OPPORTUNITIES AND RISKS 16-17 (2009), available at [http://www.ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/files/surveys\\_and\\_reports/banking\\_and\\_climate\\_change\\_-\\_sam\\_group\\_en.pdf](http://www.ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/files/surveys_and_reports/banking_and_climate_change_-_sam_group_en.pdf); Barmeyer et al., *supra* note 4, at 21.

<sup>28</sup> Smith et al., *supra* note 25, at 3.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 6.

<sup>31</sup> Rick E. Hansen, *Climate Change Disclosure by SEC Registrants: Revisiting the SEC's 2010 Interpretative Release*, 6 BROOK. J. CORP. FIN. & COM. L. 487, 490 (2012) (citing the PETITION FOR INTERPRETIVE GUIDANCE ON CLIMATE RISK DISCLOSURE, No. 4-547, 5-10 (Sept. 18, 2007), available at <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf>).

<sup>32</sup> *Id.*; e.g., Petition for Interpretive Guidance on Climate Risk Disclosure, *supra* note 31; PETITION FOR INTERPRETIVE GUIDANCE ON BUSINESS RISK OF GLOBAL WARMING REGULATION, No. 4-549 (Oct. 22, 2007), <http://www.sec.gov/rules/petitions/2007/petn4-459.pdf>; see also Kassie Siegeland, Kevin Bundy & Vera Pardee, *Strong Law, Timid Implementation: How the EPA Can Apply the Full Force of the Clean Air Act to Address the Climate Crisis*, 30 UCLA J. ENVTL. L. & POL'Y 185, 192 n.18 (2012) (discussing citizen petitions to the EPA).

<sup>33</sup> Siegeland et al., *supra* note 32, at 192 n.18. As CERES reports, investors filed 110 shareholder resolutions with 94 U.S. companies on climate-related risks. Among those are, for example, resolutions filed with CONSOL Energy and Alpha Natural Resources, two of the largest coal companies, inquiring about the impact of climate change regulation on coal reserves. See also CERES, *110 Shareholder Resolutions Related to Climate Change and Fossil Fuel Use Yield Strong*

shareholder proposals drew little attention and were often seen as a medium to express shareholder views rather than to implement corporate change.<sup>34</sup> Recently, social-policy proposals have started receiving more shareholder support.<sup>35</sup> A study from the years 2006 through 2012 found that most shareholder proposals at Fortune 200 companies concerned environmental issues.<sup>36</sup>

### B. *The Proxy and Shareholder Proposal Process*

As a general principle, a company's board of directors runs the day-to-day business of a publicly traded corporation.<sup>37</sup> Shareholders have no direct control or influence over management of the company.<sup>38</sup> However, shareholders elect the directors who manage the corporation and vote to approve certain fundamental corporate transactions.<sup>39</sup> Shareholders in public corporations are widely dispersed and generally do not attend shareholder meetings in person.<sup>40</sup> For this reason, shareholder votes must be solicited in advance through the proxy process.<sup>41</sup> The proxy process ensures shareholder participation in the affairs of the corporation.<sup>42</sup>

A proxy refers to an authorization a shareholder grants to a third party to cast a vote at a shareholders' meeting on the shareholder's behalf.<sup>43</sup> The corporation collects proxies in advance of the meeting by sending proxy materials to each shareholder. Elaborate securities laws and regulations govern these materials.<sup>44</sup> Section 14(a) of the Securities Exchange Act of 1934 and accompanying SEC Rule 14a-8 establish the relevant disclosure standards for proxy statements and

---

*Results During 2013 Proxy Season* (July 25, 2013), <http://www.ceres.org/press/press-releases/110-shareholder-resolutions-related-to-climate-change-and-fossil-fuel-use-yield-strong-results-during-2013-proxy-season>.

<sup>34</sup> Smith et al., *supra* note 25, at 10.

<sup>35</sup> CERES, *supra* note 33 (stating that the positive results in 2013 range from 40 proposals withdrawn due to commitments from the companies, support votes as high as 38% for some resolutions, and first-time carbon bubble resolutions receiving up to 22% support).

<sup>36</sup> Smith et al., *supra* note 25, at 10; JAMES R. COPLAND, MANHATTAN INSTITUTE'S CENTER FOR LEGAL POLICY, PROXY MONITOR 2012: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 13 (Fall 2012), available at [http://www.proxymonitor.org/pdf/pmr\\_04.pdf](http://www.proxymonitor.org/pdf/pmr_04.pdf).

<sup>37</sup> Joseph A. Roy, *Non-Traditional Activism: Using Shareholder Proposals to Urge LGBT Non-Discrimination Protection*, 74 BROOK. L. REV. 1513, 1516 (2009).

<sup>38</sup> *Id.*

<sup>39</sup> Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 97 (1988).

<sup>40</sup> Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1264 (2009).

<sup>41</sup> *Id.*

<sup>42</sup> See Ryan, *supra* note 39, at 97.

<sup>43</sup> *Id.* at 1264. In addition, "proxy" also refers to the instrument or paper that is evidence of such grant of authority, as well as the agent or proxy holder who is authorized to vote. See also JAMES D. COX, THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 13.26 (3rd ed. 2012).

<sup>44</sup> Fairfax, *supra* note 40, at 1264.

shareholder proposals.<sup>45</sup> Such proxy materials include any items to be voted on at the meeting and also provide a mechanism for shareholders to vote by proxy.<sup>46</sup> Generally, most shareholders simply tick a box with their votes and return the proxy cards to the company instead of attending the meeting in person.<sup>47</sup>

Any shareholder who continuously, for at least one year, held \$2,000 or more in market value, or one percent of the company's securities entitled to be voted on at the shareholder meeting, may submit one proposal to the company per shareholder meeting.<sup>48</sup> A shareholder proposal may recommend the company or the board of directors take certain action, or it may propose imposing requirements on the company or board.<sup>49</sup> Shareholders have the right to submit proposals independently to be voted on at the annual shareholder meeting. In this case, the shareholder making the proposal bears the expense of sending it to every shareholder of the company prior to the shareholders' meeting.<sup>50</sup> Instead, shareholders prefer to submit their proposals to the company for inclusion in the proxy materials that the company sends out to every shareholder.<sup>51</sup>

A company can exclude shareholder proposals for failure to adhere to the procedural requirements or for certain other reasons.<sup>52</sup> If a company chooses to exclude a shareholder proposal, it must file its reasons for the exclusion with the SEC staff and provide a copy to the shareholder.<sup>53</sup> In addition, the company will typically request a no-action letter from the SEC.<sup>54</sup> This assures the company

---

<sup>45</sup> Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n (2012); 17 C.F.R. § 240.14a-8(a) (2012). Section 14(a) simply prohibits deceptive practices in the solicitation of proxies. The SEC interpreted section 14(a) to insure fair corporate suffrage and shareholder participation as to major questions of policy. It created Rule 14a-8 to permit shareholders to present proposals at shareholders' meetings. See D. A. Jeremy Telman, *Is the Quest for Corporate Responsibility a Wild Goose Chase? The Story of Lovenheim v. Iroquois Brands, Ltd.*, 44 AKRON L. REV. 479, 485 (2011). Schedule 14A sets forth the information required in the proxy solicitations. See THOMAS LEE HAZEN, 3 TREATISE ON THE LAW OF SECURITIES REGULATION § 10.2(3), 67 (6th ed. 2009).

<sup>46</sup> Hazen, *supra* note 45, at 71. See also N.Y.C. Emps.' Ret. Sys. v. Am. Brands, Inc., 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) (stating that "proxy materials which fail to make reference to a shareholders' intention to present a proper proposal at the annual meeting renders the solicitation inherently misleading").

<sup>47</sup> Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63, 77 (2006).

<sup>48</sup> 17 C.F.R. § 240.14a-8(b)(1) and (c) (2012).

<sup>49</sup> *Id.* § 240.14a-8(a).

<sup>50</sup> Fairfax, *supra* note 40, 1265 (noting that the costs of sending out proxies to every shareholder can often be prohibitively high).

<sup>51</sup> Roy, *supra* note 37, at 1517.

<sup>52</sup> 17 C.F.R. § 240.14a-8(f) and (i) (2012).

<sup>53</sup> *Id.* § 240.14a-8(j).

<sup>54</sup> Thomas Joo, *Global Warming and the Management-centered Corporation*, 44 WAKE FOREST L. REV. 671, 673 (2009). According to the SEC, "[a] no-action letter is one in which an authorized staff official indicates that the staff will not recommend any enforcement action to the Commission



informally that the SEC will not pursue legal action for excluding the proposal.<sup>55</sup> The affected shareholder may submit a support letter to the SEC setting forth his reasons why he disagrees with the company.<sup>56</sup> After reviewing the documents, the SEC staff will either concur with the company, the shareholder, or decline to respond on the merits.<sup>57</sup> In case of the former, it will issue a no-action letter, which usually states that SEC staff “will not recommend any enforcement action to the Commission.”<sup>58</sup> If the SEC staff does not agree with the company that a proposal may be excluded, it will deny the company’s request for a no-action letter.<sup>59</sup>

### C. *The “Ordinary Business Operations” Exclusion under Rule 14a-8(i)(7)*

SEC Rule 14a-8 generally requires a company to include the proposal in its proxy material for vote at the next shareholders’ meeting unless the shareholder has not complied with the rule’s procedural requirements or the proposal falls within one of the rule’s thirteen substantive bases for exclusion.<sup>60</sup> One of these substantive

if the proposed transaction described in the incoming correspondence is consummated.” Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice, Securities Act Release No. 6253, 21 SEC Docket 320, n.2 (Oct. 28, 1980).

<sup>55</sup> Joo, *supra* note 54, at 673. The SEC retains discretion to pursue legal action. *See infra* note 263 and accompanying text.

<sup>56</sup> Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 939 (1998) (citing SEC Informal Procedures).

<sup>57</sup> *Id.* No-action letters are issued by the shareholder proposal task force put together every fall by the Division of Corporation Finance. BUREAU OF NATIONAL AFFAIRS (BNA), Corporate Practice Series, *Shareholder Proposals: Detailed Analysis, SEC Staff No-Action Process*, BNACPS No. 83-3 § IV, 2013 WL 1095301. The task force has one level of examination and three levels of review. *Id.* Individual staff examiners comprised of junior attorneys or more experienced staff attorneys from other operation groups review each no-action request and prepare a memorandum analysis. *Id.* The reviewers, who typically have previous no-action experience, review these reports and prepare a brief recommendation report. *Id.* These reports are reviewed by one of the two or three senior reviewers in the Office of Chief Counsel. *Id.* As a failsafe, all proposed no-action responses are reviewed by a member of senior staff, such as the Chief Counsel, the Deputy Chief Counsel or the Associate Director of the Division of Corporation Finance. *Id.* For significant no-action letters staff consults with the Director of the Division. *Id.*

<sup>58</sup> Nagy, *supra* note 56, at 939–40. Generally, SEC staff will not provide reasons, except for rare explanations of their position or notes on which arguments they found persuasive. *E.g.*, Microsoft Corp., SEC No-Action Letter, 2013 WL 3804841 (Sept. 17, 2013).

<sup>59</sup> BNA, *supra* note 57; If staff refuses to rule on the merits, it will typically indicate that for “legal, policy, or practical considerations” it is unable to respond on the merits of a no-action request. *E.g.*, Hawaiian Trust Co. Ltd., SEC No-Action Letter, 1991 WL 176781 (June 7, 1991)).

<sup>60</sup> SEC Staff Legal Bulletin No. 14A, 2002 WL 32987526 (July 12, 2002). The bases for exclusion under Rule 14a-8(i) are: (1) Improper under state law; (2) Violation of law; (3) Violation of proxy rules; (4) Personal grievance; (5) Relevance; (6) Absence of power/authority; (7) Management functions; (8) Director elections; (9) Conflicts with company’s proposal; (10) Substantially implemented; (11) Duplication; (12) Resubmissions; (13) Specific amount of dividends. 17 C.F.R. § 240.14a-8(i) (2012).

reasons for excluding a shareholder proposal is Rule 14a-8(i)(7), which permits a company to exclude a shareholder proposal that “deals with a matter relating to the company’s ordinary business operations.”<sup>61</sup> This rule protects the authority of the company’s board of directors to manage company business.<sup>62</sup> It is based on two main concerns. First, “[c]ertain tasks,” such as hiring decisions or quantity of production, “are so fundamental to management’s ability to run a company on a day-by-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.”<sup>63</sup> Second, the rule seeks to prevent shareholders from micro-managing the company’s highly complex matters.<sup>64</sup> Examples of such micro managing are proposals that seek intricate details, impose specific time frames, or require specific methods for implementation.<sup>65</sup>

Day-to-day business decisions are left to management, except for subject matters that “transcend[] the day-to-day business matters of the company and raise[] policy issues so significant that [they] would be appropriate for a shareholder vote.”<sup>66</sup> As a result, the company can generally not exclude such “significant policy” proposals under Rule 14a-8(i)(7) “as long as a sufficient nexus exists between the nature of the proposal and the company.”<sup>67</sup> SEC decisions in this regard are made on a case-by-case basis, taking into account the nature of the proposal and the circumstances of the company.<sup>68</sup> Thereby, the SEC considers the presence of widespread public debate regarding an issue.<sup>69</sup>

“Ordinary business” is a term of art and refers to matters that are not necessarily ordinary in the common meaning of the word.<sup>70</sup> Rather, the term refers to the corporate law concept that provides management with flexibility in

---

<sup>61</sup> 17 C.F.R. § 240.14a-8(i)(7) (2012).

<sup>62</sup> Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018, Investment Company Act Release No. 23200, 67 SEC Docket 373, 4 (May 21, 1998).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.*

<sup>66</sup> SEC Staff Legal Bulletin No. 14E (CF), 2009 WL 4363205, 3 (Oct. 27, 2009).

<sup>67</sup> *Id.*

<sup>68</sup> SEC Release on Shareholder Proposals, *supra* note 62, at 4. For example, the SEC considered the following topics to be significant policy issues: the construction of a nuclear power plant, SEC Exchange Act Release No. 34-12999, Investment Company Act Release No. 9539, 41 Fed. Reg. 52994, 52998 (Nov. 22, 1976), CEO succession planning, SEC Staff Legal Bulletin No. 14E, *supra* note 66, at 3, plant closings or relocations, manufacture of tobacco products, executive compensation, and golden parachutes, SEC Release on Shareholder Proposals, *supra* note 62, at 3, or genetically engineered food, PepsiCo, Inc., SEC No-Action Letter, 2000 WL 132488 (Jan. 24, 2000). By contrast, terrorism or terrorism prevention is generally not a significant policy issue. *See, e.g.*, JP Morgan Chase & Co., SEC No-Action Letter, 2013 WL 170414 (Mar. 7, 2013); Kansas City Southern, SEC No-Action Letter, 2008 WL 749309 (Mar. 14, 2008).

<sup>69</sup> SEC Staff Legal Bulletin No. 14A, *supra* note 60.

<sup>70</sup> SEC Release on Shareholder Proposals, *supra* note 62, at 2.

directing certain core matters involving the company's business and operations.<sup>71</sup> To avoid being excluded under the ordinary business exception, the proposal must focus on a significant policy issue and not just touch upon it or be crafted in its context.<sup>72</sup> This requires looking at the substance of the proposal.<sup>73</sup> In a no-action letter, the SEC concurred with *Dominion Resources* that a proposal requesting a new program regarding renewable power generation was excludable even though it touched upon the policy issue of environmental protection.<sup>74</sup> The underlying shareholder request implicated *Dominion's* products and services offered; a matter of ordinary business.<sup>75</sup>

Matters that relate to both a significant policy issue and ordinary business can be excluded entirely.<sup>76</sup> For example, a shareholder asked one company, *Peregrine Pharmaceuticals*, to appoint a committee of independent directors to evaluate the strategic direction of the company and the performance of management.<sup>77</sup> The SEC concurred with the company that the entire proposal could be excluded because it contained extraordinary transactions and non-extraordinary transactions.<sup>78</sup> The SEC also concurred with *Union Pacific*, permitting exclusion of a proposal seeking information of *Union Pacific's* safety efforts on the basis that "the proposal appears to include matters relating to *Union Pacific's* ordinary business operations."<sup>79</sup>

#### D. SEC Disclosure Requirements for Publicly-held Corporations

Since the 1960s, the SEC has required companies to discuss and analyze their financial condition and results of operations in SEC filings.<sup>80</sup> These disclosures apply to companies filing registration statements relating to the offering of securities pursuant to the Securities Act and companies subject to the Securities Exchange Act.<sup>81</sup> In general, a company must file annual and quarterly reports

<sup>71</sup> *Id.*

<sup>72</sup> Entergy Corp., SEC No-Action Letter, 2012 WL 6736014 (Jan. 10, 2013).

<sup>73</sup> SEC Staff Legal Bulletin No. 14E, *supra* note 66, at 2; Dominion Resources Inc., SEC No-Action Letter, 2011 WL 494126 (Feb. 9, 2011).

<sup>74</sup> Dominion No-Action Letter, *supra* note 73.

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Union Pacific Corp., SEC No-Action Letter, 2008 WL 527446 (Feb. 25, 2008); Peregrine Pharmaceuticals, Inc., SEC No-Action Letter, 2007 WL 2240164 (July 31, 2007); General Electric Co., SEC No-Action Letter, 2005 WL 283635 (Feb. 3, 2005); Wal-Mart Stores, Inc., SEC No-Action Letter, 1999 WL 152447 (Mar 15, 1999).

<sup>77</sup> Peregrine No-Action Letter, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> Union Pacific No-Action Letter, *supra* note 76.

<sup>80</sup> Hansen, *supra* note 31, at 491.

<sup>81</sup> *Id.* at 492 (providing for example that a company that publicly offers securities or has its securities registered on a national exchange becomes subject to the disclosure rules).

with the SEC and make them available to the public.<sup>82</sup> These reports provide key source information to investors about the company and its operations.<sup>83</sup> The purpose of these statements and reports is to protect investors and require full disclosure of any relevant information deemed important for making an informed investment or voting decision.<sup>84</sup>

The SEC has promulgated explicit disclosure requirements for these reports in Regulation S-K and Regulation S-X.<sup>85</sup> In addition to these explicit disclosure requirements, a company must also disclose “such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.”<sup>86</sup> Regulation S-K governs the non-financial statement portions of registration statements, annual, quarterly or other reports, shareholder reports and proxy information statements.<sup>87</sup> Regulation S-X contains the respective requirements for issuers’ financial statements.<sup>88</sup>

All of the SEC’s disclosure requirements are only triggered if the information is material.<sup>89</sup> Information is material if “there is a substantial likelihood that a reasonable shareholder (or investor) would consider it important in deciding how to vote” or when making an investment decision.<sup>90</sup> This standard does not require that an investor would actually change his vote or investment decision; information is material if it would be significant in the deliberations of the reasonable shareholder or investor, or if it significantly alters the total mix of information available.<sup>91</sup> The rationale behind this standard is to separate important information from less important information that would be irrelevant to investors.<sup>92</sup> The materiality standard is difficult to apply because there is no generally accepted formula, especially with regard to trends and uncertainties.<sup>93</sup> Companies should exercise caution to err on the side of disclosure because courts favor disclosure in light of the purpose of the securities laws – investor protection.<sup>94</sup>

---

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 493.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 17 C.F.R. § 230.408, § 240.12b-20 (2012).

<sup>87</sup> *Id.* § 229.10(a)(1) and (2).

<sup>88</sup> Hansen, *supra* note 31, at 492 (also pointing out that generally, a company must comply with GAAP and FASB Accounting Standards).

<sup>89</sup> *Id.* at 499.

<sup>90</sup> TSC Indus., Inc. v. Northway, 426 U.S. 438, 449 (1976).

<sup>91</sup> *Id.* (referring to Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)).

<sup>92</sup> Hansen, *supra* note 31, at 500.

<sup>93</sup> *Id.* at 501–08 (providing further references and examples of court decisions).

<sup>94</sup> *Id.* at 508.

Shareholders can file Rule 10b-5 fraud actions against a company for failing to make required disclosures.<sup>95</sup> In this regard, Rule 10b-5 provides an incentive to comply with disclosure requirements.<sup>96</sup>

In the context of climate change, the most relevant disclosure rules are found in Regulation S-K.<sup>97</sup> “These are: Item 101—Description of Business; Item 103—Legal Proceedings; Item 303—Management’s Discussion and Analysis of Financial Condition and Results of Operation; and Item 503(c)—Risk Factors.”<sup>98</sup> First, Item 101 of Regulation S-K requires a company to describe the general development of its business during the past five years.<sup>99</sup> Specifically, the company should describe its form of organization, the principal products or services offered, markets, distribution methods, major customers, suppliers, its research and development practices, number of employees, working capital, and intellectual property.<sup>100</sup>

Second, Item 103 of Regulation S-K requires a company to describe any material pending legal proceedings to which it is a party and any actions by governmental authorities, excluding ordinary routine litigation incidental to its business.<sup>101</sup> Routine litigation does not encompass proceedings arising under any environmental laws relating to the discharge of materials into the environment or to the protection of the environment.<sup>102</sup> The proceedings must be described in detail if they are material to the business or financial condition of the company, the potential damages exceed 10 percent of the current assets of the company, or a governmental authority brought the action for monetary sanctions exceeding \$100,000.<sup>103</sup>

Third, Item 503(c) of Regulation S-K requires a company to discuss the most significant factors that make an investment in the company’s securities speculative or risky.<sup>104</sup> The company must clearly specify any risks and their effects on the company.<sup>105</sup>

---

<sup>95</sup> Nickolas M. Boecher, *SEC Interpretive Guidance for Climate-Related Disclosures*, 10 SUSTAINABLE DEV. L. & POL’Y 43 (2010).

<sup>96</sup> *Id.* (pointing out that Rule 10b-5 civil fraud actions require a duty to disclose).

<sup>97</sup> Hansen, *supra* note 31, at 492; *see, e.g., TSC Indus.*, 426 U.S. at 448; *United States v. Basic*, 485 U.S. 224, 234 (1988).

<sup>98</sup> *Id.*

<sup>99</sup> 17 C.F.R. § 229.101(a) (2011).

<sup>100</sup> *Id.* § 229.101(c).

<sup>101</sup> *Id.* § 229.103.

<sup>102</sup> 17 C.F.R. § 229.103 cmt. 5 (2011).

<sup>103</sup> *Id.*

<sup>104</sup> 17 C.F.R. § 229.503(c) (2011).

<sup>105</sup> *Id.*

Fourth, Item 303 of Regulation S-K relates to the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A). In this section, the company must provide a narrative discussion of the company's financials enabling investors to see the company through the eyes of management.<sup>106</sup>

Moreover, it must disclose: (1) "any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way;"<sup>107</sup> (2) any "material commitments for capital expenditures;"<sup>108</sup> (3) "any known material trends, favorable or unfavorable, in the registrant's capital resources;"<sup>109</sup> (4) "any expected material changes in the mix and relative cost of such resources;"<sup>110</sup> (5) "any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations;"<sup>111</sup> and (6) "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."<sup>112</sup>

The assessment of a trend under Item 303 requires a two-step analysis. Management must first assess whether the uncertainty or trend will come to fruition.<sup>113</sup> If it will come to fruition, or if it must be assumed to do so, the company must then determine whether it will have a material impact on the company.<sup>114</sup> If management finds that a trend is reasonably likely to occur, it must move to step two of the analysis and determine whether there will be material effects requiring disclosure.<sup>115</sup> Management can avoid disclosure only if it finds such occurrence is unlikely or that there will be no material effects for the company.<sup>116</sup> But if management cannot decide whether a trend is reasonably likely to occur, management must make an objective evaluation of the consequences of this trend, assuming that the trend will come to fruition and disclose any likely material effects.<sup>117</sup>

---

<sup>106</sup> SEC Climate Change Guidance, *supra* note 9, at 6294.

<sup>107</sup> 17 C.F.R. § 229.303(a)(1) (2011).

<sup>108</sup> *Id.* § 229.303(a)(2)(i).

<sup>109</sup> *Id.* § 229.303(a)(2)(ii).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* § 229.303(a)(3)(i) (2011).

<sup>112</sup> *Id.* § 229.303(a)(3)(ii) (2011).

<sup>113</sup> SEC Climate Change Guidance, *supra* note 9, at 6295.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

### *E. The Power of the SEC to Issue Interpretive Guidance*

In releasing the Climate Change Guidance, the SEC sought to advance climate change disclosure.<sup>118</sup> The SEC has inherent powers to issue interpretations of the federal securities laws and the SEC rules promulgated thereunder.<sup>119</sup> This power derives from Congress' charge to the SEC to administer and enforce the federal securities laws.<sup>120</sup> Administrative agencies regularly interpret laws and their own regulations in order to resolve cases and controversies arising within their jurisdiction, to bring enforcement actions, to instruct their employees how to carry out programs, or perform any other tasks entrusted to them.<sup>121</sup>

These agency interpretations may be classified as "rules" under the broad definition of the Administrative Procedure Act (APA).<sup>122</sup> However, interpretive rules and policy statements are distinguished from legislative or substantive rules.<sup>123</sup> These interpretive rules do not carry with them the force of law.<sup>124</sup> Because these interpretive rules and policy statements are non-legislative rules, they are exempt from notice or comment procedures.<sup>125</sup> Yet, interpretive rules are "extremely important in guiding practitioners through the regulatory maze."<sup>126</sup>

<sup>118</sup> *Id.* at 6290.

<sup>119</sup> Nagy, *supra* note 56, at 931.

<sup>120</sup> *Id.*; U.S. CONST., art. II, § 1, cl. 1.

<sup>121</sup> Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 1004 (1992).

<sup>122</sup> Nagy, *supra* note 56, at 932. The APA defines "rules" broadly as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (2011).

<sup>123</sup> Nagy, *supra* note 56, at 932 n.43. The Attorney General's Manual on the Administrative Procedure Act (APA Manual) defines interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." THE ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947), available at <http://www.law.fsu.edu/library/admin/1947iii.html>. The APA Manual defines policy statements as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise discretionary power." *Id.* Legislative rules are "issued by an agency pursuant to statutory authority and [] implement the statute." *Id.* The Supreme Court has given the APA Manual's interpretations deference because of the role played by the Department of Justice in drafting the APA. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978).

<sup>124</sup> THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF SECURITIES REGULATION § 1.4, 61 (6th ed. 2009).

<sup>125</sup> Nagy, *supra* note 56, at 932. Courts have had difficulty applying the legal distinction. See, e.g., *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (stating that "the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"). See Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1732-35 (2007) (discussing the APA comment and notice procedures).

<sup>126</sup> Hazen, *supra* note 124, at 61.

The SEC often issues releases for different purposes.<sup>127</sup> For example, the SEC may issue a release if it wishes to clarify the meaning or effect of existing statutes or rules, especially if those statutes or rules contain vague standards or are rarely judicially interpreted.<sup>128</sup> Sometimes, the SEC announces the formal adoption of new rules or amendments to rules and explains how the SEC intends to apply these rules.<sup>129</sup> In addition, the SEC notifies the public about proposed rules or amendments to rules and solicits public comment.<sup>130</sup> In particular, SEC Divisions will publish releases to explain their views on various issues regarding statutes or SEC rules.<sup>131</sup>

Interpretations of federal securities laws and SEC rules promulgate thereunder reflect the views of the staff of the Division of Corporation Finance.<sup>132</sup> “They are not rules, regulations, or statements of the Commission. Further, the Commission has neither approved nor disapproved these interpretations.”<sup>133</sup> Thus, these views are highly informal and are not binding.<sup>134</sup> Accordingly, the interpretations are intended as general guidance, and companies should not rely upon them as definitive.<sup>135</sup>

#### *F The SEC Interpretive Guidance on Climate Change Disclosure*

Until the release of the Climate Change Guidance, companies faced the challenge of determining what they should be saying in their mandatory SEC filings about the effects of climate change on their businesses.<sup>136</sup> Some of the difficulties included determining how and when climate change will have a

---

<sup>127</sup> Nagy, *supra* note 56, at 932–33 n.44.

<sup>128</sup> *Id.*; *see, e.g.*, Guidelines for Release of Information by Issuers Whose Securities Are in Registration, Securities Act Release No. 5180, [1970–1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,192, 80,578 (Aug. 16, 1971).

<sup>129</sup> Nagy, *supra* note 56, at 932–33 n.44; *see, e.g.*, Revision of Holding Period Requirements in Rules 144 and 145, Securities Act Release No. 7390, 63 SEC Docket 2077 (Feb. 20, 1997).

<sup>130</sup> Nagy, *supra* note 56, at 932–33 n.44; *see, e.g.*, Revision of Holding Period Requirements in Rule 144; Section 16(a) Reporting of Equity Swaps and Other Derivative Securities, Securities Act Release No. 7187, Exchange Act Release No. 35896, [1995 Transfer Binder] Fed. Sec. L. Rep. ¶ 85,638, 86,881 (June 27, 1995). *See generally* Hazen, *supra* note 124, at 60, 62–63 (discussing SEC releases).

<sup>131</sup> Nagy, *supra* note 56, at 932–33 n.44; *see, e.g.*, Applicability of the Investment Advisors Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisors Act Release No. 1092, 52 Fed. Reg. 38,400 (Oct. 8, 1987).

<sup>132</sup> DIVISION OF CORPORATION FINANCE OF THE SEC, (last modified May 30, 2013), <http://www.sec.gov/divisions/corpfin/cfguidance.shtml> (last visited Nov. 12, 2013).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Hansen, *supra* note 31, at 490.



material impact on the company and what the potential effects of climate change legislation or international initiatives are without being speculative or misleading.<sup>137</sup> Thus, before the release of the Climate Change Guidance, several studies of SEC filings suggested that climate change disclosure was often lacking or not sufficiently informative.<sup>138</sup>

The SEC approved the Climate Change Guidance by a vote of three to two in 2010, three years after large institutional investors filed a petition for such guidance with the SEC.<sup>139</sup> It stated that “[t]his release outlines [the SEC’s] views with respect to [its] existing disclosure requirements as they apply to climate change matters. This [G]uidance is intended to assist companies in satisfying their disclosure obligations under the federal securities laws and regulations.”<sup>140</sup> One of the dissenting commissioners argued that the physical risks of climate change were not relevant for disclosure because they are not reasonably foreseeable and often occur only over a span of years or decades.<sup>141</sup> Moreover, the SEC lacked expertise for regulating climate change.<sup>142</sup> The Climate Change Guidance’s disclosure requirements apply to all companies or issuers subject to federal securities laws.<sup>143</sup>

The Climate Change Guidance did not create new laws or regulations but merely clarified existing laws and regulations.<sup>144</sup> It provided sample areas “where climate change may trigger disclosure,” such as the impact of legislation, regulation, or international accords on business operations, indirect consequences of regulation or business trends, and physical impacts.<sup>145</sup> Companies should also consider reputational, financial or other indirect risks.<sup>146</sup> The Climate Change Guidance outlined where companies should consider climate change in their disclosure documents.<sup>147</sup>

First, under Item 101 of Regulation S-K—which requires a company to describe its business—a company must disclose any “[f]ederal, [s]tate, 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”

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 508 (citing to several studies).

<sup>139</sup> *Id.* at 487.

<sup>140</sup> SEC Climate Change Guidance, *supra* note 9, at 6290.

<sup>141</sup> KATHLEEN L. CASEY, Statement at Open Meeting – Interpretive Release Regarding Climate Change Matters (Jan. 27, 2010), <http://www.sec.gov/news/speech/2010/spch012710klc-climate.htm> (last visited Nov. 12, 2013).

<sup>142</sup> *Id.*

<sup>143</sup> Hansen, *supra* note 31, at 492.

<sup>144</sup> SEC Climate Change Guidance, *supra* note 9, at 6290, 6297.

<sup>145</sup> *Id.* at 6295–97.

<sup>146</sup> *Id.* at 6296.

<sup>147</sup> *Id.* at 6290.

that affect its “capital expenditures, earnings and competitive position,” including expenditures for environmental control facilities.<sup>148</sup> Smaller reporting companies need only describe the costs and effects of compliance with such environmental laws.<sup>149</sup> In the context of climate change, this may potentially include the financial and competitive effects of greenhouse gas emissions regulations, and cap and trade systems.<sup>150</sup> Other examples include the development of new products, technologies, or production methods based on climate change.<sup>151</sup>

Second, Item 103 of Regulation S-K—relating to material, pending, legal proceedings of the company—may require disclosure of proceedings under any environmental laws relating to the discharge of materials into the environment or to the protection of the environment.<sup>152</sup> Examples of such proceedings may be plaintiffs seeking redress against large emitters of greenhouse gases or manufacturers of products emitting these gases, or litigation seeking to stop the construction of coal fired power plants.<sup>153</sup>

---

<sup>148</sup> 17 C.F.R. § 229.101(c)(1)(xii) (2011). Such disclosure applies for example to companies operating in countries that have ratified the Kyoto Protocol. These companies would have to report the capital costs associated with technology upgrades to reduce emissions, costs of greenhouse gas emissions credits purchased under a cap-and-trade program, and the costs of monitoring and reporting emissions. See BARMAYER ET AL., *supra* note 4, at 4.

<sup>149</sup> 17 C.F.R. § 229.101(h)(4)(xi) (2011). Regulation S-B offers disclosure relief (from the heavy and costly burden) to small companies (with less than \$25 million in revenues and less than \$25 million in market capitalization) through a more tailored small business reporting scheme (Form 10-KSB and Form 10-QSB). 17 C.F.R. § 228.10 (2009). The SEC developed Regulation S-B as part of its small business initiatives. Small Business Initiatives, Securities Act Release No. 33-6949, Exchange Act Release No. 30968, Trust Indenture Act Release No. 2287, Financial Reporting Release No. 38, 51 S.E.C. Docket 2154 (July 30, 1992). See generally Paul Rose, *Balancing Public Market Benefits and Burdens for Smaller Companies Post Sarbanes-Oxley*, 41 WILLAMETTE L. REV. 707, 740 (2005).

<sup>150</sup> Hansen, *supra* note 31, at 493. Although there is no broad Congressional greenhouse gas legislation, the EPA issued a number of regulations and rules addressing emissions limitations or reporting regimes. *E.g.*, EPA Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56, 260 (Oct. 30, 2009). Moreover, states have taken action against climate change. For example, the California Global Warming Solutions Act of 2006 and regulatory actions by the California Air Resources Board have restricted greenhouse gas emissions. In addition, the Regional Greenhouse Gas Initiative (including ten Northeast and Mid-Atlantic states), the Western Climate Initiative (including seven Western states and four Canadian provinces) and the Midwestern Greenhouse Gas Reduction Accord (including six states and one Canadian province) have been developed to restrict greenhouse gas emissions. SEC Climate Change Guidance, *supra* note 9, at 6290 n.7.

<sup>151</sup> Jeffrey M. McFarland, *Warming Up to Climate Change Risk Disclosure*, 14 FORDHAM J. CORP. & FIN. L. 281, 287 (2009).

<sup>152</sup> 17 C.F.R. § 229.103 cmt. 5 (2011). Legal proceedings encompass administrative, civil, and criminal proceedings. Environmental Disclosure Requirements, Securities Act Release No. 6130, Fed. Sec. L. Rep. (CCH) ¶ 23,507B, at 17,203–17,205 (Sept. 27, 1979).

<sup>153</sup> Mark Latham, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate-Change related Risks*, 39 ENVTL. L. 647, 665 (2009).

Third, under Item 503(c) of Regulation S-K which relates to risk factors, a company must disclose any risks as a result of climate change, such as water quality or scarcity because of its effects on supply costs or production capacity.<sup>154</sup> Other examples include the effects of greenhouse gas emission regulations and limits, natural disasters, geographic and topographic changes, increasing energy costs, and dwindling resources.<sup>155</sup> Regarding climate change legislation, the Guidance points out that disclosure of risks is different for companies in different industries, such as energy or transportation companies because such risks should be assessed depending on each company's particular circumstances.<sup>156</sup> Risk factors could also include decreased demand for goods that produce greenhouse gas emissions or increased demand for energy generated from alternative sources.<sup>157</sup>

Fourth, under Item 303 of Regulation S-K, a company should discuss pending legislation, regulations, or climate change as trends or uncertainties having an effect on the business.<sup>158</sup> Without quantifying a specific future time period for the consideration of such trends or uncertainties, the SEC stresses that the trend or uncertainty must be presently known to management and be reasonably likely to have a material effect on the financial condition or results of operations of the company.<sup>159</sup> However, the Climate Change Guidance cautions that, while materiality may limit the amount of information disclosed, the materiality standard should not limit the information management considers when making its determinations about a trend or its effects on the company.<sup>160</sup> This includes consideration of both financial and non-financial information.<sup>161</sup> Companies also are reminded to disclose information necessary to an understanding of its financial condition, as well as changes in financial condition and results of operations.<sup>162</sup>

In the context of climate change disclosure, companies consider proposed greenhouse gas legislation, costs and effects of compliance with international accords, investments in mitigation technology, and competitive pressures resulting

<sup>154</sup> Hansen, *supra* note 31, at 496.

<sup>155</sup> *Id.* (providing additional references).

<sup>156</sup> SEC Climate Change Guidance, *supra* note 9, at 6296. As the SEC noted, transportation companies only rely on products that emit greenhouse gases, creating different risks from climate change legislation or regulation compared to energy companies.

<sup>157</sup> *Id.*

<sup>158</sup> Hansen, *supra* note 31, at 495.

<sup>159</sup> SEC Climate Change Guidance, *supra* note 9, at 6294–95.

<sup>160</sup> *Id.* In general, the materiality standard ensures that companies only disclose information necessary to promote understanding of the business and not unnecessary detail, duplicative, or uninformative information lessening the effectiveness of disclosure. Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48960, Financial Reporting Release No. 72, 81 S.E.C. Docket 2905, 9–10 (Dec. 19, 2003).

<sup>161</sup> SEC Climate Change Guidance, *supra* note 9, at 6295.

<sup>162</sup> *Id.*

from production and distribution of climate friendly or unfriendly products.<sup>163</sup> Insurance companies have been among the first to note effects of climate change on their business.<sup>164</sup> Many more companies may be affected by rising insurance costs, increasing freight costs due to low river levels or weather disruptions, rising food prices, or property damage.<sup>165</sup>

Management must first assess whether an uncertainty such as pending legislation or regulation is likely to be enacted.<sup>166</sup> If management finds that it is reasonably likely to be enacted, it then must proceed assuming that the legislation will be enacted.<sup>167</sup> Second, management must determine whether the legislation, if enacted, is reasonably likely to have a material effect on the company.<sup>168</sup> If management finds that a material effect is likely, it must disclose the potential effect of pending legislation or regulation and the difficulties involved in assessing the timing and effect of such legislation.<sup>169</sup>

### *G. The SEC Decision in the PNC Financial Services Group No-Action Request*

A recent No-Action request by PNC Financial Services Group is the source of renewed focus on climate change disclosure and related shareholder proposals. Unlike most companies receiving climate change related shareholder proposals, PNC is a financial services holding company with a diversified portfolio engaging in retail, corporate and institutional banking, asset management, and residential mortgages.<sup>170</sup> PNC's day-to-day activities comprise lending, financing and investing.<sup>171</sup> In December 2012, PNC informed the SEC of its intent to omit a shareholder proposal that Boston Common Asset Management LLC (BCAM) made from its proxy form for PNC's 2013 annual shareholder meeting.<sup>172</sup> The proposal requested "that the Board of Directors report to shareholders by September 2013, at reasonable cost and omitting proprietary information,

---

<sup>163</sup> Hansen, *supra* note 31, at 496.

<sup>164</sup> Davenport, *supra* note 22 (noting that insurance companies were among the first to note effects of climate change on their business due to extreme weather because they have to pay out associated claims).

<sup>165</sup> *Id.*

<sup>166</sup> SEC Climate Change Guidance, *supra* note 9, at 6296.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> PNC No-Action letter, *supra* note 12, at 17. As of Sept. 30, 2012, PNC had consolidated total assets of \$300.8 billion, total deposits of \$206.3 billion, and total equity of \$41.8 billion. Its total loan commitment was \$182 billion as of that date, and comprised over sixty percent of the balance sheet.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

PNC's assessment of the greenhouse gas emissions resulting from its lending portfolio and its exposure to climate change risk in its lending, investing, and financing activities."<sup>173</sup>

PNC argued it could omit the proposal under Rule 14a-8(i)(7) because it related to matters of ordinary business for two reasons: First, the evaluation of risks, including climate change risks, regarding its lending portfolio is a day-to-day business decision; and second, there is no nexus between climate change and PNC.<sup>174</sup>

Because PNC's day-to-day business is lending, financing, and investing, the company continually evaluates risk using a wide range of factors.<sup>175</sup> PNC argued climate change risk is "just one of many risks" it considers "as part of its daily operations" and should be viewed as a fundamental day-to-day business activity.<sup>176</sup> The proposal, PNC reasoned, should be excludable as ordinary business activity even though it involves an environmental issue.<sup>177</sup> According to PNC, the problem of balancing the risks arising from climate change against other risks and considerations related to the resolution of ordinary business problems.<sup>178</sup> Hence, it was "impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting."<sup>179</sup>

PNC supported its argument by citing SEC decisions involving similar climate change proposals made to other banks, such as Wachovia Corporation, American International Group, Inc., and Chubb Corporation, which the SEC held excludable under rule 14a-8(i)(7).<sup>180</sup> The Wachovia proposal requested a report on the effect of climate change risks on Wachovia's business strategy.<sup>181</sup> American International Group and Chubb were permitted to exclude proposals requesting them to report comprehensive assessments of the companies' strategies to address the impacts of climate change on their businesses.<sup>182</sup>

Additionally, PNC argued that there was no sufficient nexus between the company and the nature of the proposal.<sup>183</sup> As a financial services company,

<sup>173</sup> *Id.* at 15.

<sup>174</sup> *Id.* at 16–18.

<sup>175</sup> *Id.* at 17.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (quoting Amendments to Rules on Shareholder Proposals, *supra* note 62, at 4).

<sup>180</sup> *Id.* at 18.

<sup>181</sup> Wachovia Corp., SEC No-Action Letter, 2005 WL 267915 (Jan. 28, 2005).

<sup>182</sup> American Int'l Group, Inc., SEC No-Action Letter, 2004 WL 299079 (Feb. 11, 2004); Chubb Corp., SEC No-Action Letter, 2004 WL 193246 (Jan. 25, 2004).

<sup>183</sup> PNC No-Action Letter, *supra* note 12, at 18.

PNC provides financial products and services to a wide range of customers and is not engaged in coal mining, mountain top removal mining, or other resource-intensive activity.<sup>184</sup> PNC suggested that the way its customers use the funds provided to them—for payroll, rent, office supplies—should not be of PNC’s concern.<sup>185</sup> Hence, there was no primary link between controversial actions and its lending practices.<sup>186</sup>

BCAM, the shareholder proponent, wrote a support letter to the SEC in opposition to PNC.<sup>187</sup> It reasoned that the proposal focused on a significant policy issue and had a sufficient nexus to PNC.<sup>188</sup> First, BCAM highlighted why climate change is a significant policy issue by citing the SEC Climate Change Guidance as well as other recent no-action letters acknowledging the new SEC staff position.<sup>189</sup> In these more recent no-action precedents from 2011, SEC staff reversed their prior position that climate change was not a significant policy issue.<sup>190</sup>

As BCAM also pointed out, PNC acknowledged in other disclosures that a “lack of clear carbon emissions strategy, or a low perceived action plan, could cause PNC to lose valuable customers and investors, or limit [its] ability to attract new customers and investors.”<sup>191</sup> BCAM argued that because PNC has substantial commitments to mountaintop removal companies that contribute significantly to climate change in its lending portfolio it could be affected indirectly by climate change.<sup>192</sup> PNC’s policy on climate change could further affect BCAM because PNC may be exposed to reputational risk associated with its involvement in mountaintop removal as well as financial risk resulting from the poor performance of these companies due to increased compliance costs or market downgrades.<sup>193</sup>

---

<sup>184</sup> *Id.* Mountaintop removal is a form of coal mining where the tops of mountains are literally removed to access coal underneath the surface. Mountaintop removal mining is especially criticized for contributing to climate change twofold; first, by destroying the forest which stores carbon, and second, by burning the coal mined from these operations. See *Ending Mountaintop Removal*, CENTER FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/programs/public\\_lands/mining/mountaintop\\_removal/](http://www.biologicaldiversity.org/programs/public_lands/mining/mountaintop_removal/) (last visited Nov. 12, 2013).

<sup>185</sup> PNC No-Action Letter, *supra* note 12, at 18.

<sup>186</sup> *Id.* (citing two decisions by the SEC allowing exclusion of proposals requesting policies barring funding for mountain top removal coal mining; Bank of America Corp., SEC No-Action Letter, 2010 WL 4922465 (Feb. 24, 2010); JP Morgan Chase & Co., SEC No-Action Letter, 2010 WL 147293 (Mar. 12, 2010)).

<sup>187</sup> *Id.* at 2.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 3–4, 8–12.

<sup>190</sup> The Goldman Sachs Group, Inc., SEC No-Action Letter, 2010 WL 5196317 (Feb. 07, 2011); The Goldman Sachs Group, Inc., SEC No-Action Letter, 2011 WL 50598 (Mar. 01, 2011); see *infra* note 217 and accompanying text.

<sup>191</sup> PNC No-Action Letter, *supra* note 12, at 5.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 7.

In addition, BCAM showed that there was a clear nexus between PNC and climate change.<sup>194</sup> PNC's reputation could be substantially damaged by linking PNC to mountaintop removal mining through its investments.<sup>195</sup> Furthermore, PNC could sustain substantial financial loss if the mining companies would receive downgrades or suffer financial loss themselves due to, for example, limitations on their business operations from increased regulation.<sup>196</sup>

BCAM also noted that the proposal did not micromanage PNC by prohibiting it from investing in mining companies or prescribing detailed action plans.<sup>197</sup> The proposal merely requested a report to the shareholders.<sup>198</sup>

The SEC staff declined to issue a no-action Letter and denied PNC's request to omit the shareholder proposal.<sup>199</sup> The brief statement merely reads:

We are unable to concur in your view that PNC may exclude the proposal under Rule 14a-8(i)(7). In arriving at this position, we note that the proposal focuses on the significant policy issue of climate change. Accordingly, we do not believe that PNC may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(7).<sup>200</sup>

Ultimately, PNC included the proposal when it filed its definite proxy statement with the SEC on March 14, 2013.<sup>201</sup> PNC management also included a statement in opposition, noting that such a report would require "monumental analytical effort," extensive additional training for employees, hiring of new employees, implementation of new systems and processes, and outside consulting services.<sup>202</sup> At PNC's shareholder meeting on April 23, 2013, the proposal was rejected by majority vote of 77.2% to 22.8%.<sup>203</sup>

---

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 5–6.

<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Id.* at 7–8.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1.

<sup>200</sup> *Id.*

<sup>201</sup> PNC Financial Services Group, Inc., Proxy Statement Pursuant to Section 14(a) of the SEC Act of 1934, available at [http://www.sec.gov/Archives/edgar/data/713676/000130817913000071/lpnc\\_def14a.htm#\\_N197C4](http://www.sec.gov/Archives/edgar/data/713676/000130817913000071/lpnc_def14a.htm#_N197C4). (Mar. 14, 2013).

<sup>202</sup> *Id.*

<sup>203</sup> PNC Financial Services Group, Inc., Current Report Pursuant to Section 13 or 15(d) of the SEC Act of 1934 (Form 8-K), (Apr. 29, 2013).

## III. ANALYSIS

This section first analyzes how the PNC decision recognized climate change as a “significant policy issue” and its importance for other market participants.<sup>204</sup> Then, it outlines the limitations of the PNC no-action letter and provides thought on the shareholder proposal process in enhancing disclosure in general.<sup>205</sup> Last, it examines the role of the SEC Guidance in enhancing climate change disclosure.<sup>206</sup> Shareholder control and influence over corporations and management is a prominent issue in corporate law.<sup>207</sup> Some shareholders want to influence corporate behavior.<sup>208</sup> This influence is important because shareholders are concerned about the management of a company and its effects on their investment.<sup>209</sup> One way to exert such influence is through shareholder proposals because the proposals allow a platform for voicing concerns or suggestions about the company to fellow shareholders.<sup>210</sup> However, such power is also limited because of the generous exceptions created by Rule 14a-8 and the SEC.<sup>211</sup> In this regard, the broad “ordinary business operations” exclusion rule is of particular concern.<sup>212</sup> The SEC created the “significant policy” exception to allow shareholders to raise important issues that are of “considerable importance” to shareholders.<sup>213</sup> What is considered a “significant policy” issue changes over time.<sup>214</sup> This is also true for of climate change which only in recent years has become a global issue.

*A. The SEC Recognizes Climate Change as a “Significant Policy” Issue*

The SEC’s decision in the PNC No-Action request marked a departure from previous SEC rulings on climate change disclosure. As late as the mid-2000s, SEC staff allowed exclusion of similar climate change proposals, reasoning those proposals presented a question involving the ordinary day-to-day business of

---

<sup>204</sup> See *infra* Part III.A.

<sup>205</sup> See *infra* Part III.C–D.

<sup>206</sup> See *infra* Part III.E.

<sup>207</sup> Roy, *supra* note 37, at 1516.

<sup>208</sup> *Id.* (pointing out that some shareholders are “rationally apathetic” because they only own a fraction of shares and have few incentives to fight with management; however, big funds or other corporate shareholders may own a larger share and care more about the performance of their investment).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1517.

<sup>211</sup> 17 C.F.R. § 240.14a-8(i) (2011).

<sup>212</sup> Roy, *supra* note 37, at 1520.

<sup>213</sup> Proposals by Security Holders Notice of Proposed Amendments to Rule, Exchange Act Release No. 12,598, Investment Company Act Release No. 9345, 41 Fed. Reg. 29,982, 29,984 (July 20, 1976).

<sup>214</sup> Roy, *supra* note 37, at 1529.



the company.<sup>215</sup> This practice changed with the issuance of the SEC Staff Legal Bulletin No. 14E in 2009 and the Guidance in early 2010.<sup>216</sup> In 2011, the SEC began to acknowledge the significance of climate change as a policy issue regarding shareholder proposals.<sup>217</sup>

As the SEC noted in 1998, it frequently adjusts its view with respect to “social policy” proposals involving ordinary business in line with changing societal views.<sup>218</sup> In the case of climate change, this is most likely due to increased public awareness of climate change. Furthermore, the increased public debate about climate change resulted in increased regulation and legislation. As BCAM noted in support of its proposal, “there is a groundswell of policymaking under way on [the] issue [of climate change] at the international, federal, and state level, and the public and media have come to recognize climate change is happening.”<sup>219</sup> The Guidance demonstrates the SEC’s recognition of the significance of climate change, stating climate change “has become a topic of intense public discussion” spurring national and international regulatory activity.<sup>220</sup> The Guidance even noted that financial risks may arise from physical risks to entities other than the registrants themselves.<sup>221</sup>

### *B. The Importance of the PNC Decision for Others*

First, the addressee usually accepts the SEC staff’s no-action letter because of time, money and negative publicity involved with litigating the issue.<sup>222</sup> This was also the case for PNC, which distributed the shareholder proposal with its proxy material instead of risking a legal fight.<sup>223</sup> The reason behind this lack of interest

<sup>215</sup> PNC No-Action Letter, *supra* note 12, at 2, 3 (citing Wachovia No-Action Letter, *supra* note 181; American Int’l No-Action Letter, *supra* note 182; Chubb No-Action Letter, *supra* note 182); *see also* OGE Energy, SEC No-Action Letter, 2008 WL 541778 (Feb. 27, 2008).

<sup>216</sup> SEC Climate Change Guidance, *supra* note 9, at 6290; SEC Staff Legal Bulletin No. 14E, *supra* note 66.

<sup>217</sup> The Goldman Sachs Group, Inc., SEC No-Action Letter, 2011 WL 50598 (Mar. 01, 2011) (the proposal requested that Goldman Sachs prepare a global warming report. The SEC denied exclusion of the proposal based on Rule 14a-8(i)(7), but allowed it under Rule 14a-8(i)(11)); The Goldman Sachs Group, Inc., SEC No-Action Letter, 2010 WL 5196317 (Feb. 07, 2011) (this proposal asked Goldman Sachs to prepare a report disclosing the business risk related to developments in the political, legislative, regulatory, and scientific landscape regarding climate change. Exclusion was also denied based on Rule 14a-8(i)(7)).

<sup>218</sup> SEC Release on Shareholder Proposals, *supra* note 62, at 3.

<sup>219</sup> PNC No-Action Letter, *supra* note 12, at 3.

<sup>220</sup> SEC Climate Change Guidance, *supra* note 9, at 6290. Such regulatory activities include the California Global Warming Solutions Act, the Regional Greenhouse Gas Initiative, the Western Climate Initiative, the Clean Energy Jobs and American Power Act of 2009, and EPA’s greenhouse gas reporting program. *Id.*

<sup>221</sup> *Id.* at 6291.

<sup>222</sup> Nagy, *supra* note 56, at 956–57.

<sup>223</sup> *See supra* note 201 and accompanying text.

in further litigation may be the limited force that shareholder resolutions have on the company. Even if the shareholder proposal were to receive a majority of the shareholders' votes, a company could choose to ignore it because shareholder resolutions are typically non-binding.<sup>224</sup> Moreover, management has little to lose by including a proposal because generally they receive few votes.<sup>225</sup>

PNC's no-action letter is important for other companies. It can serve as guidance for other financial institutions heavily invested in companies that are most affected by climate change. It also highlights climate change as an important public policy issue. No-action letters have an enormous practical impact on the regulatory process because they are usually the only available guidance for other companies and investors.<sup>226</sup> They have a profound effect on all market participants because other companies and investors model their behavior after the positions taken by SEC staff in no-action letters.<sup>227</sup> Thus, many companies, for example, would discontinue a business practice if SEC staff disapproved it in a no-action letter or investors crafted their shareholder proposals in light of other proposals that received positive no-action treatment.<sup>228</sup> In short, no-action letters shed light on SEC's views on a current issue.<sup>229</sup>

The SEC uses no-action letters as a strategic policy-making tool.<sup>230</sup> Through these decisions, the SEC influences climate change legislation and regulation as well as corporate behavior.<sup>231</sup> This broad strategy is possible due to the easy public availability of no-action letters, the SEC's practical retreat from its theoretical "addressee-only" position, and other regulatory advantages.<sup>232</sup> No-action letters do not require public comment or notice; rather, they can be issued immediately with regard to a specific question.<sup>233</sup> A previously voiced position may also be modified or retracted easily in a new no-action letter.<sup>234</sup>

The public has also accepted SEC staff positions in no-action letters as authoritative largely because they often present the only available guidance on a rule or statute.<sup>235</sup> Moreover, the SEC has demonstrated in its actions a willingness

---

<sup>224</sup> Joo, *supra* note 55, at 673; Ryan, *supra* note 39, at 112.

<sup>225</sup> Hazen, *supra* note 45, at 299.

<sup>226</sup> Nagy, *supra* note 56, at 946.

<sup>227</sup> *Id.* at 947.

<sup>228</sup> *Id.*

<sup>229</sup> Hazen, *supra* note 124, at 66.

<sup>230</sup> Nagy, *supra* note 56, at 947.

<sup>231</sup> Vincent Di Lorenzo, *Does the Law Encourage Unethical Conduct in the Securities Industry?*, 11 FORDHAM J. CORP. & FIN. L. 765, 767 (2006).

<sup>232</sup> Nagy, *supra* note 56, at 948–53.

<sup>233</sup> *Id.* at 951–52.

<sup>234</sup> *Id.* at 953.

<sup>235</sup> *Id.* at 954.

to adhere to the positions in no-action letters.<sup>236</sup> If the Commission disagrees with a policy, it will often announce that fact and caution the public to no longer rely on the previous policy.<sup>237</sup> The SEC also treats no-action letters as reliable authority in its releases or court briefs.<sup>238</sup>

### C. *Limitations of the PNC No-Action Letter*

Despite the advantages of no-action letters, a no-action letter also has several limitations and does not act as precedent per se. First, the no-action letters only represent SEC staff's informal views.<sup>239</sup> Thus, they do not, and cannot, adjudicate the merits of a company's position with respect to a proposal.<sup>240</sup> Only a federal court can decide whether a company may omit a proposal with binding effect.<sup>241</sup> Accordingly, the SEC's no-action letter represents an informal recommendation whether to take SEC enforcement action or not based on the current views of the SEC staff.<sup>242</sup> Any proponent, shareholder, or the company itself may pursue their rights in court.<sup>243</sup> This means that a shareholder whose proposal was omitted may bring an action against the company to enjoin the board to include the proposal in the proxy materials.<sup>244</sup>

---

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*; see *Hazen, supra* note 124, at 65. A reason for this may be that such a change may be unreasonable. See *Am. Fed'n of State, Cnty. & Mun. Emps., Emps. Pension Plan v. Am. Int'l Grp.*, 462 F.3d 121 (2d Cir. 2006) (holding that the SEC's consistent no-action position over a period of time could not be changed by a no-action response; instead the SEC would have to engage in formal rulemaking with notice).

<sup>238</sup> *Nagy, supra* note 56, at 955.

<sup>239</sup> PNC No-Action Letter, *supra* note 12, at 2.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*; see also *BNA, supra* note 57.

<sup>243</sup> PNC No-Action Letter, *supra* note 12, at 2. If SEC staff deems a proposal excludable, the shareholder may pursue his legal arguments in federal court in an action against the company alleging a Rule 14a-8 violation. *Nagy, supra* note 56, at 940. Alternatively, the shareholder may request SEC staff to reconsider its position in which case SEC staff will either reverse or affirm its previous no-action position. See *BNA, supra* note 57. SEC staff infrequently grants a request for reconsideration. *Id.* The standard is high. *Id.* In general, petitioners must present additional or new facts that could not have been brought before, show a change in law or no-action precedent, or show that the no-action response was erroneous or contrary to other precedent. *Id.* The shareholder may also request SEC review of the no-action letter. See 17 C.F.R. § 202.1(d) (2011). Because of the high burden, the remedy is rather extraordinary and such requests are rarely granted. See *BNA, supra* note 57. For example, in the 2011 proxy season, all ten requests, out of nearly 300 no-action letters, were denied. *Id.* The Commission has the option to (1) grant and affirm a staff no-action letter; (2) grant and reverse such letter; or (3) decline the request for review. *Id.* Reversals are extremely rare. *Id.* Between 2008 and 2012, it appears that the Commission never reversed a staff position. *Id.*

<sup>244</sup> *New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 13 (2d Cir. 1995). Whether the aggrieved shareholder or company may pursue their rights against the SEC in court is a disputed issue. *Nagy, supra* note 56, at 945. Although each federal securities statute contains a provision allowing for judicial appellate review of Commission orders, there are questions as to its availability.

While the SEC staff's position does not bind courts, courts do "rel[y] on the consistency of the [SEC] staff's position and reasoning on a given issue, or the lack of consistency, in determining whether a proposal that was deemed excludable by the [SEC] staff can in fact be omitted."<sup>245</sup> Generally, SEC staff interpretive statements in no-action letters do not receive the automatic judicial deference of *Chevron* or *Seminole Rock*.<sup>246</sup> Such deference usually applies to formal and official SEC orders or rules.<sup>247</sup> Reasonable interpretations of SEC rules articulated in other SEC releases also receive deference based on *Seminole Rock* if the interpretation seeks to clarify a SEC rule.<sup>248</sup>

However, courts often evade the difficult question of deference to interpretations in no-action letters.<sup>249</sup> Nevertheless, case law suggests a trend towards deference to SEC decisions.<sup>250</sup> Many federal district courts have in fact deferred to SEC authority without providing any reasons or on occasion by citing to *Chevron*.<sup>251</sup> Some courts even fail to distinguish between SEC staff and the Commission itself, or even analogize a no-action letter to a formal SEC order.<sup>252</sup>

---

*Id.* "No-action letters may be challenged as rulemaking under the Administrative Procedure Act (APA), as an arbitrary or capricious conclusion of law under the APA, or as a "final order" under Section 25 of the Exchange Act." BNA, *supra* note 57; see 15 U.S.C. § 78y (2012). The Second Circuit rejected a rulemaking challenge and held that a no-action letter is interpretive, rather than legislative, and therefore not subject to the APA notice and comment rules. *New York City Emps.' Ret. Sys.*, 45 F.3d at 12. Similarly, the Second Circuit, referring to Section 704 of the APA, implied that plaintiffs could not sue the SEC under Section 706 of the APA because they had an adequate alternative remedy against the company. *Id.* at 23. Generally, the issuance of a no-action letter by SEC staff is not such a final SEC order and is not reviewed by courts. See generally Bd. of Trade of the City of Chicago v. SEC, 883 F.2d 525 (7th Cir. 1989). Similarly, if the Commission refuses to review a no-action letter, there is no final agency action. Nagy, *supra* note 56, at 945. If the Commission did review a no-action letter affirming or reversing the no-action position, it may be reviewable as a final SEC order. See *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 675 (D.C. Cir. 1974). Not all courts follow this precedent. See *Amalgamated Clothing and Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994); *Missud v. SEC*, C-12-00161 DMR, 2012 WL 2917769 (N.D. Cal. 2012), *aff'd* (Oct. 15, 2012).

<sup>245</sup> *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 885 (S.D.N.Y. 1993).

<sup>246</sup> Nagy, *supra* note 56, at 967. *Chevron* requires federal courts to defer to any reasonable interpretation by an agency charged with administration of a statute, provided Congress has not clearly specified a contrary answer. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). *Seminole Rock* grants similar deference to informal administrative interpretation unless it is plainly erroneous or inconsistent with the regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). See generally Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U. CAL. DAVIS L. REV. 49 (2000).

<sup>247</sup> Nagy, *supra* note 56, at 977–78.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 979 (providing examples).

<sup>250</sup> Telman, *supra* note 45, at 490.

<sup>251</sup> Nagy, *supra* note 56, at 981.

<sup>252</sup> *Id.* at 982.

However, deference to the SEC is not universal. Some district courts choose not to defer to SEC staff no-action letters.<sup>253</sup> In one case, the choice not to grant deference may be explained by the fact that the no-action letter conflicted with other official SEC interpretations.<sup>254</sup>

Judicial deference to SEC interpretations of its own rules makes sense considering the general lack of expertise of judges in securities law matters. The SEC and its staff deal with securities laws on a daily basis and are experts in the field. However, SEC failure to accept no-action letters as binding interpretations of its own rules is problematic. The SEC's position that its own no-action letters are merely informal recommendations seems to undermine the important role no-action letters play in practice and in litigated cases. Moreover, SEC staff should be careful to follow official SEC interpretations and avoid contradictions. This may not be easy in practice because of the sheer number of no-action requests and the resulting split of responsibilities of SEC staff in replying to all in a timely manner.<sup>255</sup> But companies or shareholders who notice such contradictions are encouraged to petition for reconsideration and point out the differences.<sup>256</sup>

Second, third parties cannot generally rely on no-action letters because any response is subject to reconsideration.<sup>257</sup> The letters are based on the facts and arguments in the particular no-action request.<sup>258</sup> They do not act like legal precedents in court but—in the absence of other authority on point—merely guide practitioners.<sup>259</sup> In addition, the SEC's views also change with a change in administration and politics.<sup>260</sup> Frequently, no-action letters contradict each other or conflict with official positions of the SEC.<sup>261</sup> In that case, a court may choose not to rely on the no-action letter and defer to the official SEC position.<sup>262</sup>

However, the SEC should accept the important role no-action letters play for other companies and third parties. The SEC should view and treat no-action letters as precedent similar to court decisions. In case it wants to change its position, it can explicitly overrule a prior no-action position. This may make

---

<sup>253</sup> *Id.* at 985.

<sup>254</sup> *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 890 (S.D.N.Y. 1993).

<sup>255</sup> *See supra* note 57 and accompanying text.

<sup>256</sup> *See supra* note 243 and accompanying text.

<sup>257</sup> Nagy, *supra* note 56, at 942.

<sup>258</sup> BNA, *supra* note 57.

<sup>259</sup> Nagy, *supra* note 56, at 953–54.

<sup>260</sup> *See New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) (citing *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989)).

<sup>261</sup> Joo, *supra* note 55, at 675. Sometimes, the SEC will amend its official position following contradictory no-action letters. *See supra* note 237 and accompanying text.

<sup>262</sup> *See supra* note 250 and accompanying text.

it easier for market participants to follow current SEC practice. It may also be easier for a reviewing court to follow. Treating no-action letters as precedent would also not prevent the SEC from officially voicing a position in a formal statement. These formal statements would carry more force than informal no-action letters because they apply broadly to everybody and are not fact-specific, unlike no-action requests.

Third, the SEC retains discretion to institute enforcement action against a company despite issuing a no-action letter.<sup>263</sup> The Commission expressly argues that SEC staff responses are not binding.<sup>264</sup> While this may be true in theory, it rarely happens in practice that the SEC institutes enforcement action where SEC staff has not so indicated.<sup>265</sup> Thus, this statement seems more like a boilerplate hedge against too much reliance on no-action letters. But as mentioned before, market participants do rely on no-action letters.

Perhaps realizing the impact of the PNC decision, the SEC cautioned that the decision with regard to PNC “was meant only to address PNC” and “did not create a new duty for the entire financial services industry.”<sup>266</sup> In particular, the “decision was driven by ‘the particular facts surrounding PNC’s request, including the nature of the bank’s own lending criteria and public statements.’”<sup>267</sup> According to the SEC, the financial sector as a whole need not consider the issue of climate change, especially those companies without “meaningful” investments that impact climate change.<sup>268</sup> In this way, the SEC sought to limit the applicability of the PNC decision for other financial institutions to only those that are in similar positions as PNC.

---

<sup>263</sup> Nagy, *supra* note 56, at 942; *see also* Amalgamated Clothing and Textile Workers Union v. SEC, 15 F.3d 254, 257 (2d Cir. 1994) (stating that no-action letters are interpretative because they do not bind the SEC, the parties, or the courts).

<sup>264</sup> Nagy, *supra* note 56, at 942 (citing SEC, Monthly Publication of List of Significant Letters Issued by the Division of Corporation Finance, Release No. 5691, 41 Fed. Reg. 13,682 (“The Commission is not bound by these staff responses . . . The staff’s responses to letters are not rulings of the Commission or its staff on questions of law or fact . . . Further, such letters are not intended to affect the rights of private persons.”)).

<sup>265</sup> *Id.* at 943; *but see* Morgan Stanley & Co., Exchange Act Release No. 28,990, Admin. Proc. File No. 3-7473 (Mar. 20, 1991) (where the SEC charged violations of limits on sale of control person stock in connection with stock sale to satisfy margin requirements despite a prior favorable no-action letter).

<sup>266</sup> BNA, *Daily Environment Report: SEC says Scope of Climate Risk Decision Involving PNC Financial is Limited*, Feb. 21, 2013 (35 DEN A-15), *available at* <http://www.bloomberglaw.com/document/X6SD5FK4000000> (citing SEC spokesman John Nester).

<sup>267</sup> *Id.* (quoting John Nester of the SEC).

<sup>268</sup> *Id.*

*D. Thoughts about the Shareholder Proposal Process and its Role for Enhanced Climate Change Disclosure*

In its support letter to the SEC, BCAM stressed that despite the Climate Change Guidance and other disclosure initiatives, shareholder resolutions provide a powerful mechanism for encouraging companies to enhance their disclosure.<sup>269</sup> Yet, most of the shareholders proposing special resolutions on social policy issues pursue personal interests.<sup>270</sup> These special concerns may not be beneficial for all the shareholders or the company itself.<sup>271</sup> It seems that, sometimes, shareholders may be more concerned with a “political crusade” masked as shareholder activism than their value of their investment in the company.<sup>272</sup> Shareholder proposals only have a proper place in the proxy process if they relate to the corporate purposes, or even corporate reputation or good will.<sup>273</sup>

In many cases, special interest resolutions receive only meager support from shareholders.<sup>274</sup> This is mainly due to the proxy system itself, where shareholders defer to management to make the decisions.<sup>275</sup> But in recent years, voting support among shareholders for social and environmental resolutions has increased.<sup>276</sup> Moreover, the number of these shareholder proposals has also increased.<sup>277</sup> Numerous proposals seek information about greenhouse gas emissions, energy usage, or even emissions reduction targets.<sup>278</sup> Like the PNC proposal, others seek to limit lending and investment by financial institutions for companies that present environmental risk.<sup>279</sup> This suggests that more shareholders are interested in these issues and the proposals are not just special interest resolutions.

Some companies include shareholder proposals without fighting them, incurring almost no cost and saving time, and even garnering some good will for the company.<sup>280</sup> Another option is to implement the substance of the proposal.<sup>281</sup>

---

<sup>269</sup> PNC No-Action Letter, *supra* note 12, at 4.

<sup>270</sup> Fairfax, *supra* note 40, at 1270–71.

<sup>271</sup> *Id.* These proposals may also be excluded under the “personal grievance” exception. See 17 C.F.R. § 240.14a-8(i)(4) (2011).

<sup>272</sup> Telman, *supra* note 45, at 481.

<sup>273</sup> *Id.* at 483.

<sup>274</sup> See Fellow, *supra* note 7.

<sup>275</sup> See *supra* note 37 and accompanying text.

<sup>276</sup> Fellow, *supra* note 7.

<sup>277</sup> *Id.*

<sup>278</sup> Matthew P. Allen, Eric M. Jamison & Mark J. Bennett, *SEC Opens the Door for Climate Change-related Shareholder Proposals and Disclosure Requirements, with Potential New Liabilities for Public Companies*, 42 SEC. REG. & L. REP. (BNA) 359 (2010).

<sup>279</sup> *Id.*

<sup>280</sup> Hazen, *supra* note 45, at 299.

<sup>281</sup> *Id.* at 306. Although a rare choice. See, e.g., Northern Trust Corp., SEC No-Action Letter, 2006 WL 401186 (Feb. 13, 2006) (where the proponent noted: “Thank you for agreeing to initiate

Other companies actively respond to shareholder proposals instead of seeking no-action relief. This is another way shareholder proposals have an impact on corporate behavior. Generally, the board of directors includes a statement of the company's views regarding shareholder proposals in the proxy statement, and requests the shareholders to vote against the proposal.<sup>282</sup> Some companies use this opportunity strategically to disclose their progress and success with a particular course of action.<sup>283</sup> Other companies engage in dialogues with their shareholders about a proposal, which may lead the shareholder to withdraw the proposal if the company provides a satisfying answer.<sup>284</sup> This allows a company to avoid a costly battle with the shareholder through the no-action process.<sup>285</sup>

Although the case-by-case approach of no-action letters may not be the most efficient lawmaking process, it does work quite well in practice.<sup>286</sup> The line between legitimate shareholder concerns and management issues is fine and can best be addressed on a case-by-case basis.<sup>287</sup> If proposals merely seek to advance political interests over legitimate concern for corporate profits, it should be excludable. Using a case-by-case approach, the SEC is in the best position to weed out such "political crusades."<sup>288</sup>

Some claim that the shareholder proposal process has an "absurdist theater" about it because the proposal can only ask the company to form a committee or prepare a report.<sup>289</sup> They claim this because, if the proposal were to ask for a specific action, it would be seen as micromanaging the company and thus be excludable.<sup>290</sup> Yet, this approach allows for a proper balance between shareholders voicing their concerns and management running the business. Corporations should not foot the bill for dealing with social issues, best left to legislators, which have no significance or relation to their business.<sup>291</sup> Yet, climate change may have a significant impact on businesses and is thus relevant in the shareholder proposal process.

---

the process of implementing 'majority vote' in your bylaws and governance guidelines. Because of that agreement we hereby withdraw our proposal").

<sup>282</sup> Joo, *supra* note 55, at 676.

<sup>283</sup> Allen et al., *supra* note 278 (providing the example of Apple Inc.'s response to two shareholder proposals made for the 2010 shareholder meeting).

<sup>284</sup> Fellow, *supra* note 7.

<sup>285</sup> Telman, *supra* note 45, at 503. Although the costs are not that high compared to the costs of a dialogue with the shareholder. For example, a 1981 survey of 18 major corporations indicated an average cost of \$94,775 per proposal submitted.

<sup>286</sup> Hazen, *supra* note 45, at 136.

<sup>287</sup> *Id.* at 184.

<sup>288</sup> See *supra* note 272 and accompanying text.

<sup>289</sup> Telman, *supra* note 45, at 503.

<sup>290</sup> *Id.* at 503–504.

<sup>291</sup> *Id.* at 527.



*E. The Role of the SEC Climate Change Guidance in Enhancing Disclosure*

Notwithstanding the successes of shareholder proposals, the Climate Change Guidance provides for mandatory centralized disclosure rules.<sup>292</sup> By disclosing climate change information to shareholders, companies may also be able to avoid shareholder proposals. Many companies engage in voluntary disclosure, such as the Carbon Disclosure Project or the Global Reporting Initiative.<sup>293</sup> But these reporting mechanisms are decentralized and may be insufficient to fully inform investors.<sup>294</sup> Voluntarily disclosed information may need to be disclosed under SEC disclosure requirements.<sup>295</sup> There is also increased pressure on companies to include voluntarily disclosed information in SEC filings.<sup>296</sup> Companies should also ensure that voluntary and mandatory disclosure is not inconsistent.<sup>297</sup> This means that the information provided to shareholders through the mandated SEC disclosure should not contradict the information provided to the public in general by way of voluntary disclosure schemes. If this were the case, shareholders could argue that the disclosure is misleading or even false. This does not mean that they have to be identical.<sup>298</sup> Voluntary disclosure is generally more extensive, as it may include information that would not meet the SEC materiality standards.<sup>299</sup>

Despite these voluntary initiatives, disclosure has been slow in the past, mainly for practical reasons. Climate change is so pervasive that an evaluation of the risks associated with it may be costly and time-consuming.<sup>300</sup> Companies may struggle or be unable to evaluate climate risk impacts on their business on an individual basis for this reason. Others may fail to fully appreciate the risks.<sup>301</sup> Moreover, climate change risks and forecasts are inherently long-term by nature whereas some companies or investors have a more short-term approach.<sup>302</sup>

Interestingly, the Climate Change Guidance does not guide companies regarding how to assess climate change. Then SEC-Chairwoman Mary Shapiro asserted that the SEC is neutral on the facts and science of whether or not climate

---

<sup>292</sup> SEC Climate Change Guidance, *supra* note 9, at 6290.

<sup>293</sup> Mazza et al., *supra* note 11.

<sup>294</sup> Hansen, *supra* note 31, at 519.

<sup>295</sup> SEC Climate Change Guidance, *supra* note 9, at 6292.

<sup>296</sup> Hansen, *supra* note 31, at 543.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> McFarland, *supra* note 151, at 295–96.

<sup>301</sup> *Id.* at 296.

<sup>302</sup> *Id.* at 299.

change is occurring.<sup>303</sup> However, the Climate Change Guidance indicates that the effects of climate change on a business may be material to investors and require disclosure.<sup>304</sup> The question whether the SEC embraces climate change or not remains one of the main controversies over the Guidance.<sup>305</sup> The importance of the Climate Change Guidance may be that companies are put on notice that the SEC would devote greater attention to climate change disclosure in the future.<sup>306</sup> And some have observed an increase in climate change disclosure already.<sup>307</sup>

The SEC's position leaves companies with the task of determining which information on climate change is reliable, or whether the science surrounding climate change is too uncertain, or whether effects of climate change are likely to come to fruition.<sup>308</sup> It has been suggested that, after the release of the Climate Change Guidance, few companies will be bold enough to remain silent, because the SEC will be looking for such disclosure.<sup>309</sup> Similar judgment calls must be made about the likelihood of passage or adoption of legislative or regulatory measures that are very uncertain at this point.<sup>310</sup> The Climate Change Guidance does not leave a "we have no idea" option for companies, even if it is true for a particular company.<sup>311</sup> Yet, the SEC discourages speculative disclosure.<sup>312</sup>

Additionally, the Climate Change Guidance has been criticized for not carrying the force or permanence of law that a formal rule would carry.<sup>313</sup> This makes it more difficult for shareholders in a Rule 10b-5 fraud action to assert

---

<sup>303</sup> Robert E. McDonnell et. al, *Roadmap for Disclosure or Recipe for Boilerplate? The SEC Issues Interpretive Guidance for Climate Change Disclosures*, available at [http://www.martindale.com/environmental-law/article\\_Bingham-McCutchen-LLP\\_917438.htm](http://www.martindale.com/environmental-law/article_Bingham-McCutchen-LLP_917438.htm) (Feb. 19, 2010) (quoting Ms. Shapiro from the January 27, 2010 open meeting). The SEC in an accompanying press release stated the following:

[T]he Commission is *not* making any kind of statement regarding the *facts* as they relate to the topic of 'climate change' or 'global warming.' And, we are not opining on whether the world's climate is changing; at what pace it might be changing; or due to what causes. Nothing the Commission does today should be construed as weighing in on those topics.

Mary Shapiro, Speech by SEC Chairman: Statement before the Open Commission on Disclosure Related to Business or Legislative Events on the Issue of Climate Change (Jan. 27, 2010), <http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm> (last visited Nov. 21, 2013).

<sup>304</sup> Hansen, *supra* note 31, at 487.

<sup>305</sup> *Id.* at 520.

<sup>306</sup> *Id.* at 521.

<sup>307</sup> *Id.* at 522.

<sup>308</sup> McDonnell, *supra* note 303; *see also* Mazza et al., *supra* note 11.

<sup>309</sup> McDonnell, *supra* note 303.

<sup>310</sup> Mazza et al., *supra* note 11.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (citing the SEC Climate Change Guidance, *supra* note 9, at 6294–95).

<sup>313</sup> McFarland, *supra* note 151, at 309.

a lack of disclosure because the Climate Change Guidance does not impose a new duty.<sup>314</sup> Even so, litigants may find arguments for disclosure in the Climate Change Guidance.<sup>315</sup> Ultimately, only Congress can end the uncertainty about pending climate change legislation. Should Congress enact broad climate change legislation, companies would have to comply with it. Companies would then have to disclose under existing securities laws how they comply with it and how it affects their business and operations.

On the other hand, by not imposing an express duty to disclose climate change impacts, the Climate Change Guidance also acts as a guard against abusive fraud actions against companies.<sup>316</sup> A guidance is more flexible and can be amended more easily when science changes.<sup>317</sup> But the Climate Change Guidance may still force companies to strengthen their internal disclosure processes to ensure that management can make these decisions with sufficient information and force companies to make climate change disclosure.<sup>318</sup> Internally, management may be asking questions of supply-chain partners or monitoring developing areas of law not previously monitored before.<sup>319</sup> The Climate Change Guidance does not require companies to disclose their internal assessment processes in arriving at the decision whether or not to disclose climate change related risks.<sup>320</sup> Though this may leave some investors wondering, it also serves to separate important information from less important, irrelevant information.<sup>321</sup> Investors will be able to draw their own conclusions about the presence or absence of climate change disclosure.<sup>322</sup> Most importantly, the Climate Change Guidance eliminates the possibility that companies will ignore climate change and its risks.<sup>323</sup>

With the lack of congressional action on climate change, the SEC tried to balance the interests of shareholders in more disclosure and the interests of the companies in avoiding costly disclosure. It seems like the SEC wanted to address investors' concerns about climate change without taking a side in the political debate.<sup>324</sup> Although the Climate Change Guidance claims to merely remind issuers of their existing disclosure obligations, it effectively adds climate change to the list of items to be disclosed. As studies indicated, since the Climate Change

---

<sup>314</sup> Boecher, *supra* note 95.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> McFarland, *supra* note 151, at 309.

<sup>318</sup> Mazza et al., *supra* note 11.

<sup>319</sup> *Id.*

<sup>320</sup> Hansen, *supra* note 31, at 534.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Mazza et al., *supra* note 11.

<sup>324</sup> Hansen, *supra* note 31, at 520.

Guidance issuers have devoted more resources to climate change disclosure and increased disclosure.<sup>325</sup> This shows that companies take the issue of climate change more serious after the release of the Climate Change Guidance and increase their disclosure. Although, at least one commentator noted that the increase was modest and that most companies only address some climate change risks.<sup>326</sup>

#### IV. CONCLUSION

SEC staff's denial of a no-action letter to PNC's request to exclude a shareholder proposal concerning PNC's exposure to climate change risk was an important step for shareholders in the quest to obtain climate change disclosure from companies.<sup>327</sup> But shareholder power in the governance of a company is generally too limited to effect any direct changes in a company's behavior.<sup>328</sup> Moreover, many shareholders simply may not care about a company's response to climate change because they hold few shares—usually through nominees—and mainly for investment purposes.<sup>329</sup> Whether and how companies respond to the challenge of climate change depends less on shareholder governance than on outside forces that appeal both to the moral conscience and self-interest of a corporation's executives.<sup>330</sup> One of the most important factors for more climate change disclosure will be federal or state legislation and regulation.<sup>331</sup> Yet, shareholder proposals have an important place in corporate governance in addressing shareholders' concerns and providing a platform for voicing these concerns.<sup>332</sup> Acknowledging the importance of shareholder proposals and the underlying no-action process, the SEC should give more weight to its no-action letters.<sup>333</sup>

A better tool to achieve more disclosure is regulation and legislation. In this regard, the recent SEC Climate Change Guidance on the disclosure of climate change related risks clarifies companies' regular disclosure with regard to climate change risks without creating any new rules.<sup>334</sup> The Climate Change Guidance cannot address the underlying climate change causes, as it is limited to enhancing

---

<sup>325</sup> *Id.* at 521–22.

<sup>326</sup> *Id.* at 522.

<sup>327</sup> *See supra* Part III.A.

<sup>328</sup> Joo, *supra* note 55, at 673. *See supra* Part II.B.

<sup>329</sup> Joo, *supra* note 55, at 692. *See supra* Part III.

<sup>330</sup> Joo, *supra* note 55, at 671. *See supra* Part III.E.

<sup>331</sup> Joo, *supra* note 55. *See supra* Part III.E.

<sup>332</sup> *See supra* Part II.B.

<sup>333</sup> *See supra* Part III.B–C.

<sup>334</sup> *See supra* Part II.F.

disclosure under securities laws and regulations.<sup>335</sup> However, after the Climate Change Guidance's release, companies can no longer ignore the effects of climate change and are actively asked to assess and monitor climate change and how it affects their business.<sup>336</sup> Thus, the Climate Change Guidance was a step in the right direction. Even so, climate change disclosure is mainly predicated upon judgments of materiality and an understanding of the facts and circumstances surrounding a particular company.<sup>337</sup> In the end, while publicity may enhance disclosure on climate change, disclosure itself does not do anything to lessen climate change's underlying causes.

---

<sup>335</sup> See *supra* Part II.F.

<sup>336</sup> See *supra* Part III.E.

<sup>337</sup> Hansen, *supra* note 31, at 534.